## (22,229.)

## SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1911.

## No. 324.

## D. E. VIRTUE AND THE OWATONNA FANNING MILL COMPANY, PLAINTIFFS IN ERROR,

108.

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWATONNA MANUFACTURING COMPANY, AND FRANK LA BARE.

## IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John A. Riner, District Judge.

## Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of

Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of September, A. D. 1909, a transcript of record pursuant to a writ of error directed to the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein D. E. Virtue and the Owatonna Fanning Mill Company were Plaintiffs in Error and The Creamery Package Manufacturing Company, Owatonna Manufacturing Company and Frank La Bare were Defendants in Error, which said transcript of record is in the words and figures following, to-wit:

## UNITED STATES OF AMERICA:

Pleas before the Honorable the Judges of the Carcuit Court of the United States of America, for the District of Minnesota, First Division, of the May Term of said Court, Held in the City of Winona, in said District, in the Year of Our Lord One Thousand Nine Hundred and Nine (1909).

D. E. VIBTUE and THE OWATONNA FANNING MILL COMPANY, Plaintiffs,

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWAtonna Manufacturing Company, Thomas J. Howe, Frank Le Bare and Charles H. Higgs, Defendants.

DISTRICT OF MINNESOTA, 80

Be it remembered that on the 11th day of December, 1908, came the plaintiffs and filed their complaint, in the clerk's office of this court, in the words and figure following, to-wit: PROBLEM SOME SHOWS THE THE TANK THE

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# UNITED STATES CIRCUIT COURT. DISTRICT OF MINNESOTA. First Division

D. E. Virtue and the Owatonna Fanning Mill Company, Plaintiffs,

VS.

The Creamery Package Manufacturing Company, The Owatonna Manufacturing Company,

Thomas J. Howe, Frank LaBare and Charles H. Higgs, Defendants.

The plaintiffs above named, for their complaint herein against the detendants, state and allege as follows:

1.

That the Creamery Package Manufacturing Company was, on the 24th say of Pehruary 1898, and for several years prior thereto had been, and ever since said date has continued to be, a corporation duly organised, created and existing under and by virtue of the laws of the state of Illinois, with a store and its principal place of business in the city of Chicago, State of Illinois, and with a manufacturing plant located in each of the following named places, to-wit, one in the City of Mankato, State of Minnesota, one in the City of Kansas City, State of Missouri, one in the city of Mason City, State of Iowa, one in the city of Portland, State of Indiana, one in the City of Coolwater, State of Ohio, one in the City of Southwhitely, in the State of Indians, one in the City of Elgin, in the State of Illinois, and one in the City of Lexington, State of Missouri; and during all said time the said defendant has been and still is engaged in trade and commerce among the several states of the United States, incloding the above named and nearly all the other states of the United States, as follows, to-wit: During all said time said defendant has been and is still engaged in the manufacture in its said various manufacturing plants of dairy and creamery supplies and other articles of commerce, to be by it sold and distributed, and which exticles as well as other articles of commerce, have been by said defendant by common carriers, during all the times mentioned in this complaint, shipped from the said places of manufacture to and distributed in, and by said defendant sold in, nearly all the other states of the United States, and many hundreds of thousands of dollars worth of such goods and articles have been by said defendant during each of said years manufactured, sold and distributed as aforesaid, and on and prior to said date the said corporation had capital stock of the face value of \$400,000 and on said date had in stock large quantities

of its said goods to be so shipped, distributed and sold, and also owned and possessed real property, the total value of which real and personal property exceeded the sum of \$400,000.

That A. H. Barber & Company was, on the 24th day of February 1800, and for several years prior thereto had been, a corporation duly organized, created and existing under and by virtue of the laws of the State of Illinois, with a store and place of business in the City of Chicago, State of Illinois, from which it sold, and by common carriers shipped and distributed throughout said State of Illinois and other States of the United States, at retail, churns, butter making machines, creamery and dairy supplies and various other articles of general merchandise, including a combined churn and butter worker, and on said date the capital stock of said last named corporation was of the face value of more than \$100,000, and on said date said corporation had in stock large quantities of its said goods to be sold, and also occupied and possessed real property, used by it in connection with its said business, and located in said. City of Chicago, the value of which personal property alone exceeded the sum of \$100,000.

That F. B. Fargo & Company, of Lake Mills, Wisconsin, was, on the 24th day of February, 1898, and for several years prior thereto had been, a corporation duly organized, created and existing under and by virtue of the laws of the State of Wisconsin, with a store, manufacturing plant and place of business located at Lake Mills in the State of Wisconsin, from which it manufacture I, sold, and by common carriers shipped and distributed throughout said State of Wisconsin and other states of the United States, at retail, churns, butter making machines, creamery and dairy supplies and various other articles of general merchandise, and from which it furnished and installed combined churns and butter workers, and complete creamery outfits, in creameries in said states, a large portion of which goods were manufactured by said corporation including a combined churn and butter worker and on and prior to said date the said last named corporation had in stock large quantities of its said goods to be sold, and also owned and postessed real property, used by it in connection with its said business, the total value of which real and personal property exceeded the sum of \$100,000.

the 24th day of Pebruary 1878, and for several years prior thereto had been, a corporation duly organized, created and existing under and by virtue of the laws of the State of Minnesota, with a store and place of business in the City of St. Paul, State of Minnesota, from which it sold, shipped and distributed throughout said State and other states of the United States, at retail, churm, butter making machines, creamery and dairy supplies and various other articles of general merchandise, including combined churns and butter workers, and from which it furnished and installed combined churns and butter workers, and complete creamery outhits, in creameries in said states, and on said date said last mamed corporation had in stock large quantities of its goods to be sold, of the value of more than \$25,000.

Sil

That Cornish, Curtiss & Greene Manufacturing Company was, on the 24th day of February 1898, and for several years prior thereto had been, a corporation duly organized, created and existing under and by urtue of the laws of the State of Wisconsin, with a manufacturing plant, store and place of business at Ft. Atkinson, State of Wisconsin, from which it manufactured, sold, shipped and distributed throughout said state of Wisconsin and other states of the United States, at retail, churm, butter making machines, creamery, and dairy supplies and various other articles of general merchandise, including combined churns and butter workers, and on said date said corporation had in stock large quantities of its said goods to be sold, and also owned and possessed real property, used ty it is connection with its said business, the total value of which real; and personal property exceeded the sum of \$100,000.

6.

That Cornish, Curtis & Greene Company was, on the 24th day of Pebruary 1898, and for several years prior thereto had been, a corporation duly organized, created and existing under and by virtue of the laws of the State of Minnesota, with a store and place of business in the City of St. Paul, State of Minnesota, from which it sold, shipped and distributed throughout said state and other states of the United States, at retail, churns, butter making machines, creamery and dairy supplies and various other articles of general merchandise, and on said date said corporation had in stock large quantities of its said-goods to be sold, of the value of more than \$15,000.

7

That C. E. Hill & Company was, on the 24th day of February 1868, and for several-years prior thereto had been a co-partnership con-

nisting of the individuals C. E. Rill and Presidentials, owness and operating a store and remaining a plane of business at Konsas City, in the State of Kinsoni, from which piece soid partnership edd, almost and discrimined throughout and make of bijanours and other states of the United States, at retail charms, butter auching machines, creaming and draw supplies and various other articles of general merchandise and which pertnership on said dute had in stock large quantities of its said goods to be sold, of the value of more than \$30,000.

8

That on said seth day of February 1868, the various corporations bereinbelone named and said partnership made executed, entered into, signed and delivered that certain contract and agreement in writing, a copy of which is bereto attached and marked Exhibit "A."

9

That for several years before and up to the time of the execution of said contract "Exhibit A", each of the said corporations was in direct compension, in its line of bitainess as hereinbefore described, with each on said other corporations and said partnership, and said partnership was in direct competition, in its said line of bitainess, with each of sail corporations, and that as the result of said competition all the articles, goods and perchandise bereinbefore mentioned were said prior to said date throughout said states at no more than a fair and legitimete profit to the seller.

10.

That prior to said date the said corporations and partnership name factured, transported from one state of the United States to various and mostly all the other states of the United States and sold at retail in the usual course of business a lorge portion of all the mode, articles and merchandise of the kind hereinbefore mentioned sold at retail or used throughout said states, and during all the times in this complaint mentioned or referred to there were ansually many hundreds of thomsands of dollars worth of said goods, articles and merchandise sold, alapped and distributed in and throughout said states, and plaintiffs alloge upon information and belief that prior and up to said date the usid corporations and said partnership controlled and did over ninety-five per cent, of all the business of manufacturing and selling creatnery and dairy santiles in the States of Michigan and Indiana and is all the states of the United States in the west thereof, as well as a large part of the business to the out of said states manufacturing said goods in one or more of said states and shipping the usual by common carriers from said states

where manufactured to unit the mate and charmaing and the mid in said other saites.

That directly after the execution of said contract "Exhibit A," That directly after the execution of said contract "Exhibit A," and during the year 1896 the property of A. H. Barber & Company, held in stock by it for safe in its creamery supply and its refrigerations and said our merstip (except the firm of said Cornish, Curtis & Cosess Manufacturing Company, mentioned in the presemble to said contract "Exhibit A,") was appraised by a committee appointed for the purpose, all as contemplated and provided for in said contract (except also the property described in the schedule attached to the end of said "Exhibit A,") and the said property so appraised was terred over and delivered to said Creamery Package Manufacturing Company by the said respective corporations and said partnership, as was likewise the property mentioned and valued in said schedule attached to the end of said "Exhibit A," and the said Creamery Package Manufacturing Company duly increased its capital stock from the annufacturing Company duly increased its capital stock from the annufacturing Company duly increased its capital stock from the annufacturing Company duly increased its capital stock from the annufacturing Company duly increased its capital stock from the annufacturing of \$400,000 to the sum of \$2,000,000 and turned over and delivered to the officers and stockholders of said other corporations and said partnership shares of its capital stock for and in payment of all of said property in each case the face value of such capital stock so turned over being in the same amount as the appraised value of said property so appraised and in the same amount as the value of opposite said property mentioned in said schedule attacked to the ead of Exhibit A" hereinbefore mentioned, and the said Creambry Package Manufacturing Company therespon and thenceforth attacked to own and did control all the said property.

That ever since about Pehrenry 24th, 1858, the said Creatiery Backage Manufacturing Company has likewise assumed to over and control and has controlled, by strine of said controls, Richibit A? and directed all the acts and tonduct of all the officers and agents of said observorporations and firms, and continues so to do, in so far any of them remain in existence, and that ever since the time of the exception of said contract all its terms, supulations, and provisions have been and are now being performed and serviced out by the parties thereto, all as provided in said contract, except that there were never issued or distributed by said Creatiery Package Manufacturing Company the gold bearing bonds provided for in paragraphs 13 and 15 of said contract. to of said contract.

That ever since the said property was threed over to it, the said Creamery Package Manufacturing Company has continued to direct, manage, conduct and control the business and affairs of each of said other corporations and said partnership in the names formerly used by such corporations and said partnership, except that sometime shortly after the making of said contract the said Creamery Package Manufacturing Company discontinued the store and place of business of the said Cornish, Curtis & Greene Company at St. Paul, Minnesob, and sometime during the year 1900 the said Creamery Package Manufacturing Company caused the name of said F. B. Fargo & Company, both of St. Paul, Minnesota, and at Lake Mills, Wisconsin, to be changed to the Pargo Creamery Supply House, under which last name it still continues to operate the said atores and places of hunness, and that sometime about May 20, 1808, the said Creamery Fackage Manufacturing Company caused the name of A. H. Barber & Company, theretofore used by it in its said business, to be changed to A. H. Barber Manufacturing Company, and that sometime about September, 1903, it discontinued entirely the store and place of business of said A. H. Barber, Manufacturing Company, and that some-time about the latter part of the year 1808 it discontinued the name and place of business of C. E. Hill & Company and removed all its property held in that name to the warehouse and plant of said Creamery Package Manufacturing Company in Kansas City, Missouri, a bill of sale of all property of said C. Z. Hill & Company having been shortly after the making of said contract "Exhibit A" made, signed, executed and delivered by said C. E. Hill & Company to said Creamery Package Manufacturing Company pursuant to the terms of said contract; and except as in this paragraph hereinbefore stated, ever since about the 24th day of February 1898, the said Creamery Package Manufacturing Company has continued, and still does continue, to manage, operate and conduct and continue the said various stores to manage, operate and conduct and continue the said various stores and places of luniness under the names aforesaid, that is to say, its manufacturing plant and place of business in Chicago, Illinois, under its said name, its place of business in Minnespolis, Minnesota, under the said rane, its place of business in St. Paul, Minnesota, under the name of the Pargo Creamery Supply House, its manufacturing plant and place of business at Lake Mills Wisconsin, under the name of the Pargo Creamery Supply Equae, and its manufacturing plant and place of business at Pt. Atkinson, Wisconsin, under the name of the Consist, Cartie & Greene Manufacturing Company.

the said Creamery Package Manufacturing Company has operated, conducted and continued its said business of selling, ahipping by common carriers and distributing its said churus, butter making machines, creamery and dairy supplies and various other articles of general merchandise, in and through said several states, and also its said manufacturing business, by and through the different bouses and places of business located in the different cities and places hereinperfore described, and has so done by and through the different names provided for in said "Exhibit A" (except and with the changes specified in the last preceding paragraph), and in so carrying out and transacting its said business the said Creamery Package Manufacturing Company has, ever since said date, represented to the public generally, and to its customers and purchasers that each and every one of said different houses and places of business was a separate and an independent house and place of business, a competitor in the market of said Creamery Package Manufacturing Company, and not connected with it in a business way; and each a competitor of the other; and ever since said date said Creamery Package Manufacturing Company has sent out its traveling men from said different houses and places of business as traveling from and for separate and competitive concerns, who have, under express directions from said Creamery Package Manufacturing Company, at all times, represented and claimed to the general public and to customers and purchasers of its goods that each of the said different houses was in direct competition with each other of said houses, and that each was a competitor of all the others, while in truth and in fact there never has been since said date, any competition between them; and in so doing and in carrying out said scheme the said different traveling men from said different houses, during all said time, under instructions from said Creamery Package Manufacturing Company, whenever bidding on a contract for the furnishing of goods or supplies to a creamery or customer, where competitive bids were required and sought, have under instructions from said Creamery Package Manufacturing Company, met and secretly arranged the bid each should interpose, determining by lot and in other ways who should interpose the lowest hid and who the next and who the highest until all bids were prearranged, all without the knowledge or consent of the proposed customer, and by such secret meetings and schemes the said Creamery Package Manufacturing Company has deceived the public and its customers and has caused them to believe and suppose that they were securing competitive bids when in fact they were not, which bids have been accepted and acced upon by said customers; and on all bids and in all other deals each of said different bouses has, under the instruction from said Creamery Package Manufacturing Company, agreed to stand by and prot

March 16, 1006, there was a vertale contract on their make entered and delivery and the design of the Country o

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the plane of tentions is the Chr. of December. Himself, from all that plane is the plane of the christ tent is the association and that the except and the christ tente which is not tente which plane. It was decing all made traces to tente when the contract the said cover and batter worker becomes with some total decimand by the tente of the United Server, or be and said value to other States of the United Server, or be and soil obtained by the time batter being used and said at any cost executively in the economics bester in the unity districts of all secretarity in the economics bester in the unity districts of all secretarity in the economics bester in the unity district of all secretarity in the economics bester in the complete must cost the lad at secretarity in the economics bester in the complete must cost the lad at secretarity the decimal participal property of the cost and salar of more than 400000.

That the sold Communic Manufacturing Company and the policy country Package Manufacturing Company, at or should be warrons the because the parties, factor, contained deliceral cultured to and thereafter operated upder and current our met performed a conditions of, those certain contacts temperaturely as follows.

One dared April 19, 1897, heren soneset and marked Exhibit

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for the man, he said Cay of Ownerse, and from these continually shapping by conseque carriers the greater part of the same two other states of the United Sense and distributing and selling the same to and as commerces located in said other states, which "other states has manifered these plaintiffs allege upon information and belief, include all the states hereinbelove mentioned outside of the State of Stime-son, and that in this way has said Owntonia Manufacturing Company been doing transcening and continuing to the present time as said business, except us the same has been controlled and passed not the bands of the said Creamery Package Manufacturing Company, as set forth and stated in said contracts hereto attached made by and between said Creamery Package Manufacturing Company and said Owntonia Manufacturing Company and said Owntonia Manufacturing Company, been conducted, carried on and continued, throughout all said states, by the said Creamery Package Manufacturing Company and said Company and said Creamery Package Manufacturing Company and said Contracts.

20.

That on or about April 19, 1897, the Disbrow Manufacturing Company, a corporation duly organized created and existing under and by virtue of the laws of the State of Minnesota, and Reuben B. Disbrow, Levi A. Disbrow, Darius W. Payne and Horatio N. Seeley, as parties of the first part, and the said Owatoma Manufacturing Company, as party of the second part, made, signed, executed, delivered, entered into, and thereafter operated under, carried out and performed the conditions of, that certain contract in writing, a copy of which is hereto annexed and marked "Exhibit B (9)."

21

That also on or about April 21, 1897, the said persons named as parties of the first part in and to the said contract mentioned and referred to in the last above paragraph, made, signed, executed, and delivered to said Owatoma Manufacturing Company, in accordance with and pursuant to the said contract mentioned in the last preceding paragraph, that certain assignment of patents, a copy of which assignment is hereto annexed and marked "Exhibit B (10)."

That on or about April 19, 1857; the said Diabrow Manufacturing Company, and Reinben B. Diabrow, Davius W. Payne; Levi A. Lance and Simutio N. Soely, as perties of the first part, and the self-framery Package Manufacturing Company, as party of the econd part, agreed, executed, delivered, exected hato, and thereafter operated under, carried out and performed the conditions of that certain contract in writing, a copy of which is hereto associated and particul "Exhibit B (11)"

23

That on or about January 22, 1900, the plaintiff and the defendant Creamery Package Manufacturing Company, and certain others named therein, made, executed, and delivered at Chicago, Illinois, that certain contract in writing, a copy of which contract is hereto amexed and marked "Exhibit C."

24

That the parties of the second part in and to said contract accerexpected or intended to carry out or perform the condition things mentioned in said contract by them to be done and performed, but they secured the execution of said contract only for the purpose of preventing these plaintiffs from manufacturing the combined churn and butter worker mentioned in said contract under the patent referred to therein, No. 634.074, and for the purpose of leceping said combined churn and butter worker off the market; and that si the execution of said contract Exhibit C, the plaintiff D. E. Virtue has done and performed all the things stated in said contract to be done and performed by him, as has likewise the Martin Deeg mentioned in said contract as one of the parties of the first part; but that the parties of the second part in and to said contract have never done the things mentioned therein to be done and performed by them, and have never made or manufactured any combined churn and butter worker pursuant to said contract and did never push t to completion a test churn of said patent or complete the patterns therefor, or put the same into actual operation, and never attempted to correct or strengthen the weak parts thereof and did never commence or continue the regular construction of said churn and butter worker for the market, and never did any reasonable amount of advertising to promote the sale of the same.

25

That on July 8, 1904, there was, by said defendant, Owntonna Manufacturing Company, made and filed with the clerk of the Circuit Court, of the United States, in and for the first division of the State of Minnesons, at Winous, a bill of complaint against said Owntonna Faming Mill Company and D. E. Virtue, as defendants, a court of which bill of complaint is hereto americal and marked "Ecchibit D (1)", and that on or about said late there was a subported

next by said overt of eatd Court, in the moral form, in the said extensis. Manufacturing Company and its sitterney, and extend them to be served upon said Constains. Panning Mill Company A.D. E. Virtue by the proper officer on July 26, 1704, and said seen in capity of the Constains Membracturing Company against said extensis. Furning Mill Company and D. E. Virtue was thereupon of thesely easy commercial against said Constains Panning Mill memory and D. E. Virtue and pending in said United States Cir-

That on October 23, 1904, said Owstonna Fanning Mill Comany and D. E. Virtue as defendants in said action brought by said Ovanous. Hastoriacruring Company made and filed in said Circuit Court fiely asswer to said bill of complaint, a copy of which answer is broth answer and marked "Exhibit D (2)" and that thereafter and on November 9, 1904, the said Outtonna Manufacturing Company made and filed in said Circuit Court its replication, a copy of which is hereto ansexed and marked "Exhibit D (3)."

That thereafter said section so commenced by said Owatoma Manufacturing Company and pending was duly trief, a large amount of evidence was their and arguments of counsel were made, and said action was passing until January 25, 1907, on which dute a final decree was made, rendered and entered in said Circuit Court in favor of said Owatoma Fanning Mill Company and D. E. Virtue and against and Owatoma Manufacturing Company and said action was duly terminated to favor of said Owatoma Fanning Mill Company and D. E. Virtue and against the said Owatoma Manufacturing Company, a copy of which final decree is hereto annexed and marked Bahibbi D (4)." Exhibit D (4)"

That all the defendants named as such in the complaint in this That all the detendants named as soon in the complaint in this action compired with, firged and caused the said Owstonns Manufacturing Company to commence and prosecute said action in equity and that and action in equity against said Owstonna Famming Mill Company and D. S. Virres was, by the defendants herein commenced and prosecuted maliciously and without probable cause upon the false and provides claims and assertious set up in the said bill of company field by said action, and that all the allegations at said bill of company were at all times tills and assert thereto, and that all the allegation was said an ever allegation as and that all the allegation was said an ever allegation and that all the allegations are said to easily an every size of the said that all the allegations. legations contained in said answer to said bill of complains are said at all times were true, as stated therein, all of which things in this paragraph stated the defendants herein at 5.1 times well knew that the said Owntown Fanning Mill Company and D. R. Virtue were put to great trouble, inconvenience and expense, and were obliged to do and did a large amount of work and said D. E. Virtue traveled many thresholds of relies. thousands of miles, and they were obliged to and did procure witnesses, employ counsel and prepare for trial, and try said action in equity on the merits, and necessarily expended large stores of money in so doing; that said D. E. Virtue for and on behalf of himself and said Owatonna Fanning Mill Company actually spent and put in two years and four weeks time upon said case in equity properly preparing the same for triel and in defending the same, and much of the time and labor so put in by him was at places far distant from his home, the City of Owatenna, and in traveling about the country, and that the reasonable value of the time and labor so put in by said D. E. Virtue is the sum of \$6,000 per year, all of which was necessarily done, and on account of such traveling about said Owatonna Fanning Mill Company and D. E. Virtue were required to and necessarily did expend and pay out large sums of money, and they were obliged to and did pay out to attorneys in defending said action in entity, or become indebted to said attorneys for large sums of money; and in procuring necessary witnesses who testified on said trial and in paying other necessary expenses connected with said trial they necessarily expended and paid out large sums of money, all of which sums of money herembefore mentioned were reasonable and proper and were necessarily expended, or incurred where not paid, in and about the said action in equity, and that none of said sums have been paid back to said Owatonna Faming Mill Company or D. E. Virtue; that all the moneys enumerated in this paragraph as having been expended were so expended by and on behalf of both said Owstonna Fanning Mill Company and D. E. Virtue, and that all the indebtedness mentioned in this paragraph as having been incurred has been so incurred by, and is now owing from, both said Owatonna Fanning Mill Company and D. E. Virtue, and that all the work and labor performed and all acts dotte, mentioned in this paragraph, were so performed and done at the instance and on behalf and for the benefit of both said Owatoma Fanning Mill Company and D. E. Virtue, and that the value of the time and labor so put in and necessarily expended by or on behalf of said Owatoms Fanning Mill Company and D. E. Virtue, and the said sums of money so necessarily paid out and expended by them, and the indebtedness so necessarily incurred by them, are, together with the dates thereof, as follows to-wit:

Amount necessarily expended for witnesses, (all prior to	
January 1, 1907).  Amount necessarily paid out and expended procuring exhibits for use and which were actually used on the trial of	\$2,095.7
exhibits, for recoing the same for use and wilder	
Amount recessarily paid out for board, hotels, railroad	117.3
经分别的 医多种性 医多种性 医多种性 医多种性 医多种性 医多种性 医多种性 医多种性	
Ansount necessarily paid out on attorneys fees and expen- ses of attorneys and not included in any other item mentioned herein (all paid between March 18, 2006 and	1,632.0
Amount necessarily paid out on attorneys fees and expenses of attorneys and not luchtded in any other item mentioned herein (all paid out poor to March 17.	48.7.
NORD Free Contract Co	1,867.00
Amount necessarily paid out on attorneys fees and expen- ses of attorneys and not included in any other item	
Amount necessarily incurred by attorneys, and fees of said attorneys, all of which has been necessarily incurred	333-33
and is now owing by plaintiffs to said attorneys, and not iscluded in any other item mentioned herein, and none of which has been paid, but which is now due and	
owing on note (together with interest on said sum from July 30, 1908, at the rate of 6 per cent, per annum which interest is not included in the following sum),	
Amount necessarily incurred by the attorneys, and fees of said attorneys, all of which has been necessarily in- curred and is now owing by plaintiffs to said attor-	4,647.72
and which is not included in any other item mentioned herein (together with juterest thereon from March 17	
1908 which interest is not included in the following	
Amount of time and labor put in by plaintiff D. E. Virtue in preparing for trial, traveling about and attending the	3.991.18
and the second case of the second state weeks, at rate of	
	12,500.00

to

That on July 6, 1914, there was, by the defendant Creamery Package Manufacturing Company, made and filed with the Clerk of the Circuit Court of the United States, in and for the first division of the State of Minnesota, at Winons, a bill of complaint against said Owatonna For any Mill Company and D. E. Virtue, as defendants, a copy of which bill of complaint is hereto annexed and marked "Exhibit E (1)", and that on or about said date there was a subpoens issued by said Clerk out of said court, in the usual form, at the instance of said Creamery Package Manufacturing Company, and its attorneys, requiring the defendants in said action to make answer within the time provided by law, which subpoens the said Creamery Package Manufacturing Company caused to be served upon said Owatonns Fanning Mill Company and D. E. Virtue on July 16, 1904 by the proper officer, and said action in equity, was thereupon and thereby duly commenced and is still pending in said United States Circuit Court.

30.

That thereafter, and on November 18, 1904, the said Owatonna Fanning Mill Company and D. E. Virtue, as defendants in said action in equity brought by the Creamery Package Manufacturing Company, made and filed their answer in said Circuit Court to said bill of complaint, a copy of which answer is hereto annexed and marked "Exhibit E (2)", and that thereafter and on December 2, 1904, the said Creamery Package Manufacturing Company made and filed in said Circuit Court its replication, a copy of which is hereto annexed and marked "Exhibit E (3)".

31,

That all the defendants named as such in the cooplaint is unla action conspired with, urged and caused said Creamery i ackage Manufacturing Company to commence and prosecute said action in equity and that said action in equity against said Owatoma Fanning Mill Company and D. E. Virtue was by the defendants herein commenced and prosecuted maliciously and without probable cause upon the false and groundless claims and assertions set up in the said bill of complaint and filed in said action, and that all the allegations of said bill of complaint were at all times false and untrue, except such as are admitted in the said answer filed by said Owatoma Fanning Mill Company and D. E. Virtue in answer thereto, and that all the allegations contained in said answer to said bill of complaint are and at all times were true, as stated therein, all of which things in this paragraph thated the defendants herein at all times well knew that said Owatoma.

Painting MTI Company and D. R. Virtue were part to great trouble inconvenience and expense, and were obliged to do and did a king amount of work and said D. L. Virtue Tayeler many thousands of sales, and they were obliged to and did progue witnesses, employed. econsel and prepare for trial and try said action in equity on the menta, and necessarily expended large sums of money in so doing; and that end D. E. Virtue for and on behalf of himself and said Owleton. ma Fanning Mill Company actually spent and put in one year and two weeks time (non said case in equity properly preparing the same for trial and in defending the same, and much of the time and labor so put in by him was at places far distant from his home, the City of Ownand in traveling about the country, and that the reasonable value of the time and labor so put in by him it the turn of \$6,000 pe Overcome, Finning Mill Company and D. E. Virtue were necessarily coursed to and did expend and pay our large sums of money; and that said Ower once Fanning Mill Company and D. E. Vietne were obliged to and did pay out and expend to attorneys in defending two action in equity, or become indebted to taid attorneys for large sums of money, and in procuring necessary witnesses who testified on said trial, and in paying other necessary expenses consected with said trial said Gwatenne Fanning Mill Company and D. E. Virtue necessarih paid out and expended large sums of money, all of which sums of money havembetore mentioned were reasonable and proper and were recessivity a punited, or incurred where not paid, by said Owatoma Pauling MIN Jampany and D. E. Victue in and about the said action in equity, and that noise of said sums have been paid back to them; and all the moneys enumerated in this paragraph as having been expended by and on behalf of both said Owntonns Parating Mill Company and D. E. Virros, and that all the indebtedness mentioned in this paragraph. having been incurred has been incurred by, and is now owing from said Owaterna Familia Will Conpany and D. E. Virtue, and that all the work and labor performed and all acts done, mentioned in this paintgraph, were so performed and done at the instance and request and on behalf and for the beautift of that said O-vatoring Funding Mill Company and D. E. Virtue, and then the value of the time and labor to put in by them - I the said sums of realey so herestarily paid out and expended by them, and the indebtodoms so necessarily mounted by them, are, together with

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That the contract of February 44, 1808, a copy of which is hereto That the contract of February 24, 1806, a copy of which is hereto americal and marked "Exhibit A", is, at the time of its execution was a set all times since its execution has been in violation of law and last public policy and interly void and of no force or effect whatever, as has libewise been each and all bills of sale of personal property and transfers of real property, and all assignments or transfers of patient or present rights, or other interests or rights, made pursuant in said contract or provided for or contemplated by its terms or which have been since made for the purpose or with the intent of carrying out or giving further force or effect to said contract of February 24, 1856, or accomplishing its objects and purposes; and that the only transfers or assignments in it said Creamery Package Manufacturing Communications has ever had of the patents No. 140, 371, 361, 720, or 600, 178. company has ever had of the petents No. 539,371, 365,720, or 600,168, med on by it in the said action brought by it against these plaintiffs, as bereinbefore stated, were made to it as a part and portion of said contract of February 24, 1898, and to carry out its terms and to enable the said Creamery Package Manufacturing Company to carry out and perpetrate the wrongful and unlawful acts and ends complained of tercin, and to enable the said Creamery Package Manufacturing Company to secure and control all potents and letters patent in the United States overing the art and industry of manufacturing combined churns and lutter workers, which patents and letters patent covering such art and industry land been prior to the making of said contract owned and controlled by different persons and controlled by said and controlled by different persons and corporations, some by said F. B. Pargo & Company, some by said Cornish, Cartis & Greene Manufactoring Company, and some by other manufacturers, and botween all of which different comporations and manufacturers owning or controlling such different letters patent and patents, there had been prior and up to said Pebruary 24, 1898 strong competition in the manufacture under such different patents respectively, interstate transportation and sale of such combined chums and botter workers, and all of which aperition was destroyed by the wrongful acts of the defendants in this complaint describes; and that said Creamery Package Manufactilring Company never had, owned or possessed any title, right or interest in or to any of said patents, or any right or authority to bring action against these plaintiffs upon any of said patents for infringement or otherwise, and that all attempted conveyances of any of said patents or patent rights to said Creamery Package Manufacturing Company have at all times been wholly void and of no force or effect, as all the defendants berein at all times well know.

in crumers in form in "assignment of Coun" model executed and delivered by one Catamory Package Manufacturing Company to said Overtonia Manufacturing Company, these plainting we informed and believe a copy of which in hereto americal and marked "Exhibit E (4)" and on lanuary 27, 1908 a copy of said last named exhibit was handed to had served upon these plaintiffs by said Creamery Package Massifacturing Company and said Owston in Manufacturing Company to further carry out and accomplish their wrongful and pricked schatter. and encopiracy.

That prior to the bringing of said two actions in equity, hereinbefore described, said Owatonna Fastning Mill Company and D. E. Vistne had commenced and then were engaged and continuing in the manufacture and sain of combined churns and butter workers, making the same in their manufacturing plant in this complaint described, located in the City of Owatonna, Minnesota, and then laid agents and agencies throughout the several states of the United States who were prechasing and handling, and were ready, willing and able to purchase and handle such machines made by them, and prior to and at the time of the bountage of said two souts in agents and Owatonna Fastning Mill of the bringing of said two suits in equity said Owettoms. Fastning Mill Company and D. E. Virtue had a good and established trade and market for their said churns and prior thereto had been and then were manufacturing the same in their said manufacturing plant at Ownton-in, Minnesots, and shipping the same from there by common carriers to, and distributing and selling the same at various and different places in other states of the United States, to-wit, the states of Wisconsin, love and South Dakote; and that defendants, well knowing these things, and being fearful that said Owntonia Fanning Mill Company and D. E. Victus would continue to present a large states of anch page and D. E. Virtue would continue to receive a large share of such trade States and would increase the same, and being tearful that they would sall further encrosed upon the business theretofors /njuyed by defendants in the said like of business commenced and prosecuted aid two actions in equity to prevent any further sales on the part of old Owatoma Fanning Mill Company and D. E. Virtue, so prevent any further offer on the part of old Owatoma Fanning Mill Company and D. E. Virtue, so prevent and destroy the interestate trade and commerce of said Owatoma Fanning Mill Company and D. E. Virtue, and at the same time, said prior thereto and over since, have the defendant written letters and talled to pure waters and prospective purchasers of the characteristic by said Owatom a Fanning Mill Company and D. E. Virtue, threatomag and purchasers and prospective purchasers with law saids and actions for damages for infringement of the letters patent described or referred to in the complaints in said actions in equity, charact to be owned by

Adam becoming Company, it such perchabers bought or used my such machines, made by said Owntonias Francing Mill Company and D. E. Virtney and at the same those and also both before and after the time of the company-cement of said two actions in equity old the defendants, by and through their agents and employees and or like purposes and for the same reasons, and to spears and rotate for themselves their and appropriate that Owntonias Painting Will Company and D. E. Virtne with law suits actions for damages and only suits for insurance of the same reasons. the suits for injunction if they should not at once cease entirely the numifacture and sale of combined churns and butter workers; and but in this way, as well as by the bringing of said autions, and the that in this way, as well as by the bringing of said utilious, and the circulating and publishing of the news by them that they laid brought such saits, did the /efendants destroy and take away the customers and prospective customers of said Owatoma Fanning Mill Company and D. E. Virtue and deprive them of their said markets for churns and decrease and destroy their said interstate trade and / numeror and for the same reason did their customers cease and discontinue dealing with them and their said interstate trade and commerce was customally throatened, decreased and discorping; and that at the time of the commencement of said two scious in equity, and at many different times since their commencement, have the said Owatoms Fanning Mill Company and D. E. Virtue laid a large number of prospective purchases of their said charas located and doing business in said several states, as well as in many other states of the United States and such prospective purchasers were ready, willing and able to purchase, and plaintiffs allege upon information and belief, would have purchased and paid for large numbers of such churus » a large product to said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said Owatoms Panning Mill Company and D. E. Virtue would have said or said or said warions states, and there sold to purchasers and hitpers, many thousands of dollars worth of churus each year, but a not teen for the serongful acts of the defendants in this complaints.

There is the 18 (tay of John 1904, said Owntons, Farning Mill part and the first transfer of the part becomes the part of the second of the companies of the companies of a manu-oral phase and stee owners in fee or the hard on which the man-and it broaded, the tarm / ang love 17. A, 19 and 20 in black 3 with Aldbroa to the Chy of Coronana, in Starte County, Minnessed and the in sect date and Orationa, Passing Mill Company and D. L. Vacue were, and over time date have been, the owners of all the instures patterns, machinery and other personal property located and about mid manufacturing plant and weed and for use in connection, with the came, which manufacturing plant, fixtures, patterns, machinery and other personal property were designed and suitable for use, and were actually used, in the manufacture of combined churms and butter workers, and were intended, prepared and made for that purpose; and unit on the 16th day of July, 1904, the said lots, thansfecturing plant, fixtures, patterns, machinery and other personal property were of the reasonable worth and value of the same of Sancocco; and that by reason and because of the unlawful acts of the defendants in this complaint mentioned and set forth said Owatonus Fanning Mill Company and D. E. Virtue have been deprived of the full me and benefit of said property hereinbefore in this paragraph mentioned ever since July 16th, 1904, and that the reasonable use and value of the said use of the said property of which they have been so deprived since July 16th, 1904, is the sam of \$4,000 per year, and that by reason of the wrongful acts of defendants in this complaint mentioned and described the value of said property has been decreased in the sum of \$15,000, and that by reason of the things in this paragraph stated said Owatonus Fanning Mill Company and D. E. Virtue have been througed in the sum of \$15,000 and in the further sum of \$4,000 per year amee said July 16, 1904.

## (36 withdrawn)

## 37

That if the plaintiff in the first described rate in equity had prevailed and secured a favorable decision on the marks, the said Owatonas Farming Mill Company and D. E. Virtue would have had their said business and property in this complaint described, destroyed and rained for all time, and their said business and property would have been of no value, as all the defendants herein well-knew; but that is the plaintiff in said second suit in equity above described had prevailed over said Owatonas Farming Mill Company and D. E. Virtue and had secured a final decree against them, the said property of said Owatonas Farming Mill Company and D. E. Virtue would not have been destroyed or seriously injured, as the defendants at all times well knew; and that with knowledge of these things did the said defandants commendately were prosecuted jointly and at the same time and by the same attorneys, and that if the plaintiff in said second suit in equity was ever entitled to any relief whatever in said sait, the relief demanded in

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That directly prove to October 3, 1800, the plaintiff D. E. Virrae, and one Martin Deer both residents and citizens of the City of Owertown, Seale County, State of Minnesota, were the original, first and jone inventors of certain new and useful improvements in combined charms and buttor powers, fully described in the letters patent hereinsafter set forth, which had not been known or used by others in this country and not provided or described in any printed publication in this say y foreign country persons their invention or discovery there of, and sole in public use or or sale for more than two years prior to their application for such letter patents, and that plaintiff D. E. Virtue and sald Deer duly made application to the proper department of the government of the United States for letters patent therefor, in accordance with the then existing acts of congress, and the rules and requirements of the commissioner of patents were in all respects compiled with in sed prior to the making of such application, and that thereafter, and on October 3, 1800, letters patent of the United States were fasted to D. E. Virtue and said Deeg, in due form of law, under the seal of the patent office of the United States, signed by the secretary of the finterior, and countersigned by the commissioner of patents of the finterior, and countersigned by the commissioner of patents, and bearing the date and year aforesaid and numbered 634,074. ests, and bearing the date and year aforesaid and numbered 534,07%, a copy of which letters patent is hereto annexed and marked "Exhibit F (1)", and that by reason of the foregoing there was granted and secured to plaintiff D. E. Virtue, and to his heirs, and licensess, for the term of seventeen years from and after the date of said letters patent, the full, and except as against said Deeg the exclusive, right and liberty of making, using and vending to others to be used the said inventions and improvements set forth in said letters patent as in and by said original letters, material afters; and that he present at the improvements if letters patent appear; and that by reason of the issuance of and inal letters patent appear; and that by reason of the issuance of and letters patent there was secured to plaintiff, and to his licenses hereinafter named, the full right of making and selling throughout the United States, machines containing and having the inventions and improvements covered by and specified in said letters patent No. 634.074 at whitever profit could be realized from such manufacture and sale, without accounting to said Deeg or to any other person for any of such profits, and without sty competition in the manufacture and sale of the same except such as should arise from and on the part of said Deeg, and his lightness or sections if any, and that the said Deeg far not, not and his licensee or assigns if any; and that the said Deeg has not, and has any person for him, nor any assigns or licensee of hit, even make or sold but two or three experimental machines containing or currently such inventions or improvements; except as otherwise in this paragraph stated and that during all the time for more than five years print

remedical Toward State the deline of all persons of the control of the delenations of the control of the of this course, and the nact Dong entered after a constant and the nact Dong entered after a constant pattern themselves that the the national restant to the set of Virgos about factor and that the tributes did have, the talk their and authority pressor and legal constitutions and for White received as the set of investigation and Drey of transitionations and either knack to talk improvements and investigation periods in qualitative product 140, 624,094 without payment to said Drey product 140, 624,094 without payment to said Dress product 140, 624,094 without payment to said Dress product 140, 624,094 without payment to said Dress product 140, 624,094 without payment to said the did Dress agreed with said Virgos and with said companies, that he would exclude great and part to the fall agree and the said agree and the said agree and the part of the part id the said C

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That the investions and improvements described in and covered a mid-letters passes over several had not been previously shown in used by others, and that a machine build in accordance with still attention trail petent over several to any other machine of like harmater, and that it was more several to any other machine, once easily negative and much space density in the residual tracking and operated than any other, and that and inscribe and partial and operated than any other, and that and inscribe and status accessed aportly and algorithy, and a machine made a more date thereof any other and attachments and acceptance to the written and superities and of great value; and had a not been for the wester used unlawful arms of the determination of the complaint set forth, said Deviation. Finally, Mill Company and D. R. Virtue, these planetiffs allow uses information this will be and the complaint set forth, said Deviation. Finally, Mill Company and D. R. Virtue, these planetiffs allow uses information this said latter a patient in write the sum of at loss from plaint in and in the latter approximate and have realised on of the value of such me would have realised on of the value of such me would have such as and all of the value of such me would have any interest of the trade and comments in this complaint the souled in reasons of the trade and comments in this complaint the souled in reasons of the trade and comments in this complaint the souled in reasons of the trade and comments in this complaint the souled in reasons of the could see a deprived of the value of the said of unit like to the thing of unit like to the said of unit like to the time. It then

use and one if A. Bracklory form residents and statem of the City of the course of the factor of the course of the

and company with him, that he would and did grant and give to Owitoma. Panning Mill Company full right and authority as new to mentifecture and sell the same, and that the said Owitoma and sell the same, and that the said Owitoma are Mill Company about and would manufacture and sell sech into together with the said Victor; and that during all said five the said Owitoma Farming Mill Company and D. E. Victor the said Owitoma Farming Mill Company and D. E. Victor have been manufacturing selling and shipping by common ner have been manufacturing acting the United States such the gether have been manufacturing, selling and shipping by a hines, except as they have been scopped and prevented from so doing and on account of the wrongful acts of the defendants do in this complaint; and that a portion of the combined churus and butter workers in this complaint immission and described as having cen made and sold by said Owstonn's Fanning Mill Company and D. E. Virtue contained and had such improvements and inventious, and other such machines would have had and contained such improvemosts and inventions had said Owatomic Farming Mill Company and D. E. Virtue not been prevented from making use of the same by soil on account of the wrongini acts of the defendants set forth in and on account of the wrongful acts of the defendants set for in this complaint. And that during all the time for more than five years prior to the bringing of this action the said Virtue and the said. Dwaltons Fanning Mill Company and the said Hagedorn entered made and continued an agreement between themselves that the said that the said Virtue should have, and that the said Virtue should have, and that the said Virtue should have, and that the said Virtue and Company did have, the full right and authority granted to them spon full and logal consideration and for salise received as licensees by and from said Hagedorn, of manufacturing and belling machines containing all site said improvements and inventions specified in or covered by said letters patent No. 665,500 without payment to said Hagedorn of any of the profits received by them on such saids and that during all said time said Hagedorn agreed with said Virtue and with said company, and they with him, that he would am did grant and give to them upon full and due considerations and for value received the full right and authority as licenteen to make factors and self-auth machines at their own cost, side and expense and without in any way accounting to said Hagedorn for any part or manufacture and sell such machines at their own cost, risk and expense and without in any way accounting to said Hagedom for any part or rios of the profits and moneys received from such manufactura 

That the value of the use of said letters patient so granted to and attained by said Owatoma Faming Mill Company and D. E. Virtue (i. e. the right on their part of maintfacturing and selling such machines containing, wit having such investibins and improvements throughout the United States free from any competition on the part of any person except said Hagedorn and his assigners and licensees if any, and without accounting to any person for any profits to be made by them from such sales), during the five years prior to the beginning of this action, was, used except for the wrongful acts of defendants as set forth in this complaint would have been, the sum of \$5,000 per atnum; but that by and on account of the wrongful acts and doings of defendants, as in this complaint set forth and described, the whole of the waise of the set of such patent rights, ever since July 16, 1904, has been and still a enturely just to and taken away from said Owatoma Faming Mill Company and D. E. Virtue, and they have thus been deprived thereof.

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That the inventions and improvements described in and covered by and letters patent were new and had not been previously used by others, and that a machine built in accordance with said invention and of not bear imperior to any other anchine, of like character, and that a said more simple in construction, move easily operated, and more clearly in its work, and could be more chearly constructed and operated than any other machine, and that said invention and patent possessed browley and ingenuity, and a machine made in accordance therewish would do its work more readily and easily than any other machine, and such machine was practicable and of great value; and had it not been for the wicked and unlawful acts of the defendants in this complaint set forth, said Owatoma Famming Mill Company and D. E. Virtue, these plaintiffs allege upon information and belief, would have realized out of the use of such rights in and to said letters patent in value the sum of at least \$5,000 per annum since said July 16, 1904, and all of the value of such use would have been available to ano in fact enjoyed by them; but that by said on account of the wrongful acts of the detendants in this complaint described, in restraint of the trade and commerce of these plaintiffs among the said several states of the United States. Once plaintiffs have been deprived of the whole of the value of such use, to their damage in the sum of \$5,000 per annum ever since said July 16, 1904.

enters and enters at any process (greaterness. Seeke Council the financial, was the original, first and sole amenage of certain new metal improvements in positive) there and better workers, full origin in the letters patient her can feer an factly which had not course as used by others in this councy, and not patients of critical in any printed publication in this or any foreign councily in seventials as discovery thereof, and not in public see or particular as discovery thereof, and not in public see or particular than two years prior to his application for each internal and that plaintiff Virtue duly made application to the proper during of the paragraphent of the linted Seates (or letters better the nest of the government of the United States for letters patent therefor, in accordance with the then existing acts of congress in that behalf, and that the conditions and requirements of the acts of congress and repairements of the acts of congress and repairements of the acts of congress and experts complied with in each prior to the making of such application, and that thereafter, on July 30, 1907, letters patent of the United States were leaved to plantiff D. E. Victor, in the form of her linter were listed to plaintiff D. E. Virtue, in due form of law, we roed by the a he seal of the pateur office of the United States, si ary of the Interior and countersipned by the commissioner of pater and bearing the date and year aforesaid, and numbered 861,361, a copy of which letters patent is hereto annexed and marked "Exhibit F (3)." med that by reason of the foregoing there was granted and secured to plaintiff Virtue, and to his heirs and easigns and licensees if any, for e term of seventeen years from and after the date of said letters tent, the full and exclusive right and liberty of making, using and vending to others to be used the said invention and improvements set forth at said letters patent as in and by said original letters patent appear; and that by reason of the foregoing plaintiff D. E. Virese now is, and ever since said July 30, 1907; has been, the owner of said letters patent and that during all the time times July 30, 1907. the date of said letters pasent, the said Virtue and the said Ownsons Faming Mill Company entered into, made and continued a agreement between themselves that the said Ownstones Faming Mill Company should have, and said company has had, the full right and authority, granted to it as licensee by and from said Virtue of manufacturing and selling machines containing such improvemented inventions, and that during all said time the said Virtue agree with said Owatonin Fanning Mill Company, and said necessary with with said Owatonin Farming Bull Company,
him that he would and did grant and give to said Owatonin Farm
Mill Company full right and authority as licenses to manufact
and sell the same, and that the said Owatonin Farming Mill O
pany should and would manufacture and sell each machiner. with the said Virtue.

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to all fails virtue, and to his said because by sits carers patent were, and except for the wrongful acts of the defendant set forth in this complaint at all times would have been, the sum of \$4.000 per annum; but that by said on account of the wrongful sets and dangs of the defendant in this complaint mentioned and described, these plaintiffs have been deprived of all the use and benefit of said rights ever since last mentioned date, all of which is to the damage of plaintiffs in the sum of \$4,000 per annum ever since said July 30,1007.

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That the investion described in said letters patent and covered thereby was now and had not been previously known or used by others, and that a machine built is accordance with said invention and patent was superior to any other machine of like character; that and patent was superior to any other machine of like character; that it was more simple in construction, more easily operated, much more cleanly in its work and could be more cheaply constructed and operated than any other, and that said invention and referst possessed movelty and ingenuity, and a machine made in accordance therewith would do its work more readily and easily than any other machine, and such machine was practicable and of great value; and had it not been for the wicked and unlawful acts of the defendants in this complaint set forth, these plaintiffs would have realized out of the use of their rights in and to said letters patent in value the sum of at least \$4,000 per annum since the said date of the usuing of said letters patent; to wit: July 30, 1907, and all of the value of such the would have been available to these plaintiffs; but that by and on letters patent; to-wit: July 30, 1007, and all of the value of such use would have been available to these plaintiffs; but that by and on account of the wrongful acts of the defendants, as set forth in this complaint, these plaintiffs have been derived of the whole of the value of the use of their rights to and to said letters patent, to-wit, the sum of \$4,000 per annum since said has named date, to their damage in said sum of \$4,000 per annum ever since July 30, 1907; and that times said date a number of churns have been made and old by these plaintiffs containing and having the improvements and inventions specified in and covered by said last named letters patent, such churns laving been made by blaintiffs in their said manufacturing plant in Owntonia, and by them shipped by common carriers therefrom to various places in other states of the United States and in said other states sold and distributed to purchasers and need and many other combined churns and bitter workers containing and having such improvements and inventions would have been so mannifectured, by common carriers shipped and distributed and sold in other states by plaintiffs had it not been for the wrongful acts of the other states by plaintiffs had it not been for the wrongful acts of the desendants in this complaint stated.

That had it not been for the wrongful and unlawful acts of the defendants in this complaint described these plaintiffs would have exited out of the inventions and improvements specified in and sovered by the hereinbefore described is one patent in the mannfacture and sate by them of their said or abined churus and butter workers, the full value of the use of met inventions and improvements at the prices and values hereinbefore specified, all of which would have been available to and secured by these plaintiffs by and would have been evaluable to and sectivel by these plantime by and through their said business of manufacturing in their said manufacturing plant in the City of Owstonna, State of Minnesota, the said combined churus and butter workers containing and having such inventions and improvements and by shipping the same by common carriers from their said place of business in Owstonna to different places in other states of the United States and in said other states places in other states of the United States and in asid other states telling and distributing the same to purchasers and issers; and these ever since said July 16, 1904, these plaintiffs have manufactured and by common carriers shipped to the states of Jowa, South Dakots, Illinois, Pennsylvania, Michigan, New York, Temassee, Washington, Wisconsin, Kansas, and Misconsin, and in said states sold and distributed a small number of last combined churns and butter workers having all the improvements and inventions contained in and covered by said letters patent from the respective dates of said letters patent, as hereinhefore given, but that such business so carried on by plaintiffs since said July 16, 1904, has been small, and has been obtained at such great expense, all on account of the wrongful acts of defendants in this complaint described, that the same has been of no value to plaintiffs, and has been conducted by plaintiffs at a loss; and that during all the times plaintiffs have conducted and carried on an interstate business, as hereinhefore described, they have also occasionally manufactured and sold a combined churn and butter worker wholly within the state of Minnesota, but that such business wholly wholly within the state of Minnesota, but that such husiness which within the state of Minnesota has been so small and insignificant and of but little consequence as compared with the said interstate business acquired by plaintiffs and which they would have secured and enjoyed had it not been for the said wrongful acts of defendants.

That during the year 1858, and subsequent to Pelevary 24, of that year, the said Crumery Package Manufacturing Company for the purposes of destroying competition purchased and took possession of all the real and personal property of A. J. Costonas & Company tred by said latter named company in conducting its business at

Waterloo, lowe, which real and personal powerty-to personal at the street of an them of the actual value of over Moloco and at the time of, an for several years prior to, said parchase, the said A. J. Cushman a Company was a comparation, dely organised, created and anistin under and by virtue of the laws of the saids of lowe. With a storaged plane of horizon at early city of Waterlay, in lower from which pace said A. J.-Cushman & Company was engaged in the battern of valling shipping and distributing throughout said states of lower Milinearth, and other states of the United States charms, better only ing machines, dairy and creamery supplies, and other marchandia, all in compatition with said Creamery Package Manufacturing Company, and that after the said purchase by said Greamery Package. Manufacturing Company has ever been carriedy discontinued except in the same has ever since said purchase been conducted at said Waterloo, Rown, by and in the supple mans of the Creamery Package Manufacturing Company.

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That Massive has the said eventury Package Massifestaring Company since said Pebruary or, 1858, purchased the business and properties of many other concerns, competitors of said Cremner Package Massifecturing Company in the said lines of business, including Package Manufacturing Company in the said three of business, including the business and property of Coulc & Raid, of the City of Des Mones, State of low- and the property and business of the Promont Botter Tob Company, focated in the City of Rock Island, State of Himos, and the business and property of Stocked Manufacturing Company, located in the City of Raidand, State of Verment, and the organizery and dairy supply business and property of Stocked Alama, City of St. Paul, Minnesote, and if the City of Kannas City, Minnount, and also the property and business of R. W. Wheel & Company, located at the Paul, Minnesote, which last amond pareing you made in the year 1905; a portion of which surchase was made on the part of the mild Company. Package Minnesotess Company. on the part of the said Creaming Process Mean asserting Company, or to purchasing the purezzal property and transitions also the real property of said various concerns, and sometimes by its purchasing he capital stock of the corporation conducting the business, and some of which phases of husiness the said Oreanery Package Man-structuring Company has discontinued estimate, and others of which is the continues and combined in the most of the converse Ar-loudes are and eith others of which is has employed in its con-stance and sho has said Oreanery Package Manufacturing Comman in charged and become and still in the holder of a hope portion of

Give of San Prancisco, in the State of California, and the State of California, which made with the Intention of California, and the Intention of California, and California, and the Intention of California, and California, and California, and California, and the Intention of California, and California, and California, and California, and California, and the Intention of California, and Intention of Califor

That said Creamery Package Hamilacturing Company, tharing the last several years the exact number of which is unknown to hamily has had company, which contracts with very many and numerous dealers to be goods where and merchandise sold by said Creamery Package Manufacturing Company, which contracts consider processions required by the dealers of physiciaes sinch goods exclusively of said Creamery Package Manufacturing Company said to sell the same at certain fixed and resonanted prices and each temperature dealers to sell only in a certain designated territory, which dealers so under contract with said Creamery Package Manufacturing Company have been and now at local dealers and purpose of which contracts is to turther secure to said Creamery Package Manufacturing Company a more complete monopoly in its said line of business and to further restrict and restrain intended commerce and destroy competition, all of which contracts in this purposesh referred to are now in the possession, control and castody of said Creamery Package Manufacturing Company and no castody of said Creamery Package Manufacturing Company and no castody of said Creamery Package Manufacturing Company and no castody of said Creamery Package Manufacturing Company and no castody of said Creamery Package Manufacturing Company and no castody of said Creamery Package Manufacturing Company and no

The (ii) see of the defendants in this complaint see forth of the done and performed by their pursuant to a common come and onespiracy on their part, entered into by and between 10 label from the during the year 1507 and 1508 and by them were to maintained and carried on, ladd to score to themselves the maintained and carried on, ladd to score to themselves the between all the buttiness of maintaining to considering by context valling and formishing to considering and other maintains to considering and other maintains machines and other than and other carry and character and other throughout the United States, and to drive all the buttiness, not within said combass includes the plainting, out or pushess, and to rain all the buttiness of all said other persons, including these plaintings. That all by sex of the defendants in this complaint sex forth or

within sald combine, and who were as any or at any time stage the formation of said combine have been engaged in like binness, and that he and through the text agreements bereinbefore the fefferdent and the acts of the defendants bereinbefore stated, the defendant id, during the years 1897 and 1898, and over since, create, case and become members of and parties to a roof trust, combines on and obstructuration to regulate and fix the selling price of taid chirms bottor making machines an ideary and createers supplies and fix an appropriate and sold throughout the United States, and did so formatic enter into said pool, trust and combination in restraint or trade and between the several states of the United States, which propress, combination and conspiracy did at all times tend, and still does tend, to limit, fix, control, maintain and regulate the prices of said theres, butter making machines and dairy and creamery supplies manufactured, brought or sold in said states; and which pool trust, combination and conspiracy did in fact, and still does, limit, fix, control, maintain and regulate the prices of said strictes of trade within and throughout said states, and which pool, trust combination and conspiracy did limit and still continues to limit and did turing all said times tend to limit the production and transportation or that articles throughout the averal states of the United States, and during all said times tend to limit the production as a transportation or that articles throughout the averal states of the United States, and during all said times did prevent and still prevents and limits competition in the purchase, transportation and said states, all of which things the said prot trust, combination and conspiracy was designed and intended by man desendants to do and conspiracy was designed and intended by said desendants to do.

That by and through the acts of detendants in this complaint specified, they have, ever since March 1, 1808, timited fixed controlled, in intained and regulated the prices of churus, butter making machines, and dairy and creamery supplies manufactured sold or transported throughout the several states of the United States and have limited the production of such articles and prevented and limited competition in the purchase, manufacture, transportation and sale thereof throughout the said states; and by means of the things in this complaint stated the defendants have been able to and have greatly advanced and maintained the prices at which they have sold the said articles throughout said states at a profit to themselves of many fundateds of thousands of dollars amountly.

That all the acts and doings of the defradams in this complaint as forth, including the making of the contract, attached as exhibits

companies and the Jague curve of the first complete or the curve of the proposition of the first complete or restricted of Anterviate trade and consisters among the research of the United States and ever since Petersary 44, 140, and still do reasonable the interviate trade and consisters of states in the unitary, saying, celling and transporting of cluster distances in the unitary, saying, celling and transporting of cluster matrices and they and excursely supplies among a matrix matrix and the part of the contrary of the part of the contract o better making nurchases and there and createry supplies among sold rates and by virtue of the aild acts and draines on the part of the defendants they have ever since Fabruary 24, 1898, destroyed consection in and have attempted to anonopolities and have trompolities, the interestate trade and occamente among the everal states of the United States in charge, before a rating mechanics and deary and a summery supplies, and that by virtue of the Kaings in this paragraph states these plaintiffs have been vrouged demaged and injured in their salet business and property by the defendants in the way and manner more particularly in this complaint at other places described and that all the damages seed injury occamed by these plaintiffs as alleged in this complaint, has been caused by the facts set furth in this paragraph. And that by reason of the foregoing have the two delegions corporations, ever since February 24, 1898, wrongfully and entities per cent of the business of manufacturing shipping by complete carriers and selling combined thurss and butters in the States of Michigan and Indians and all the states of the United listes of Michigan and Indians and all the states of the United to the west and southwest thereof, except that dering periods of such time some other person. Arm or corporation would did start and continue for a short time in said business in or continue for a short time in said business in or continue to a short time in said defendants whereupon said defendants would petition with said defendants, whereupon said defendants would and did, in some instances in the way and manner described and referred to in this complaint, drive them out of business and destroy and vain their business and property, and would and did in some instances purchase their business and property and secure agreement from such other persons, fruits and corporations that they would not ever spain singage in such fundance; and that at all times since Peterer spain singage in such fundance; and that at all times since Peterer spain singage in such fundance; as the bare said two defendent corporations so error unlessfully had said ecoured to themselves as least about and unlawfully had and secured to themselver in each limited control of till the huminess of manufacturing, selling and shippy common carriers such complised charits and botter workers states of Michigan and Indians and in all the states of the Shites to the stream and indians and in all the states of the Shites to the stream southwest thereof; and that liberage incenses have said two corporations ever since and February as wrongfully and unlawfully becared to themselves and last a loyed over nucety per cent of the business of selling and a loyed over nucety per cent of the business of selling and a loyed over nucety per cent of the business of selling and a loyed over nucety per cent of the business of selling and a

The control of the defendancy and each control the effect of the control of the effect of the control of the co

That all the constructs and agreement product as arbitrals to this arbitrals and all constructs, isolgiments or patents, agreements billiousle, transfers of property by andparent, and all other documents, personal records, set up or referred to as the complaint, or attached a exhibits theretay and which have been made or executed a fact the instance of request of add Commercy Puchage Mannatages Company to one of the parties thereta. (except alone the patent between attached and marked "Exhibit C" at to plaintiff that, are and at all times have been wholly null and word contrary law and public voticy and in direct violation of the terms and exhibits as it is "Sherman And Trust Law", herein mentioned of that tone of the determinate over acquired any rights or privilege whatever, or title to any property or property rights, under, by through any or said contracts, agreements belong said, transfer, apper and documents.

That at no time prior to user you said als means before the come of this action did plaintiffs know or here my reason to use any notice or knowledge of any of the extraogram is at one defendants in this computat described or referred to the said wrongful or unlowful combination and company, or secondaries said acts in violation of said "Sherman Ann Frunt Law," the contract or agreements attached to achieve to this commit (except those the contract market "Exhibit C4" and except a plaintiff, how of the bringing and proscendon of this two stone in equity at the time thereory but this during all the time thereory but this during all the time thereory has the during all the time thereory and purposedy concent and level accordance to the fermionic society and purposedy concent and level accordance in the market with all three from the general public, the said according to this said contracts and agreements the said according and units full contracts and agreements the

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That at the three of the commencement of said two actions to the hereinbetoes described, the said Owatersus Passings Mill Compared D. E. Virtue, and their said business in this complaint delicit, the good mandate, credit and separation, throughout the said less of Manneste. Wieconsis, Illinois, Love, South Dakotz and other ten. It will be the good will of all persons with whom they had lings in and business, as well as others, all of which was of the centimencement of said two saids of the sum that thus of the commencement of said two saids of the sum that the Staton, and all of which has been lost and destroyed and thereofs the wrengful and unlawful acts of this definidants in a complaint described, to the damage of those plantings in the sum that of

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WHEREBOORE, PLAINTIPP ASKS JUDGMENT Against the scale of backets for and this for the same of backets, to and this for damages areasined by them and interest, by virtue of the ned in this complaint (whether the same are matoded in the terms mentioned in the above paragraph 53 or not), including that the plaintiffs are cathled to under the provisions of german Anti-Trusi-Law", together with a reasonable above and the costs and distourcements of this section.

LEACH A REIGARD. Paintiff's Attomora

# EXHIBIT A

Charles D. Ames, R. D. Barnes, Mary C. Rarnes, Smart C. Harme, J. E. Reliman, Mrs. L. S. Rabines, H. L. Reliman, John A. Rell. dry. Journe, Rell., D. M. Barrett, W. S. Depley, Roman Carriers, R. L. Carter, Mrs. George P. Cano, Mrs. E. J. Clark, Charles P. Conper R. W. W. Cornell, Mrs. Mrs. E. J. Clark, Charles P. Conper R. W. W. Cornell, Mrs. Mrs. R. J. Clark, Charles Rev. P. Davis, administratory of the sease of E. H. Cartie, Edw. P. Davis, Male, R. Davis, O. J. Davis, Mrs. A. R. Edder, Rev. H. J. Rerris, W. L. Berris, Carris, M. Ferris, W. S. Perris, C. W. Perris, Marstin Flemming, C. M. Gates, Mrs. Mary B. Gates, S. J. Giffman, Mrs. Clark, Gliffman, Mrs. Mary M. Graham, L. R. Henris, Eds. L. Kimples, C. H. Riggs, S. J. Kolb, E. R. Kimshall, Res. Perris, Kimball, Rich. and R. Edwish, Charles L. Kolm, W. L. Landis, Mrs. Carl Ladwig, George W. Miser, Chie Desators Neweth, Mrs. Ed. J. Norman, Famile L. Partier, P. P. Porter, Mrs. Ide E. Porter, Dr. P. B. Porter, Mary P. Prot, D. H. Roe, W. P. Rounds, C. M. Ryan, Russa. Alary P. Pratt. D. H. Roe, W. P. Rounds, C. M. Ryan, Rrana age, W. W. Sherwin, Mrt. George P. Smith, George L. Townson, Mrs. P. A. Treat, George Walter, G. A. Walker, Miss Lucy E. Walter, Pearl M. Walter, Charles F. Weller, Mrs. P. R. Winne, D. B. Wood, and Sarah Alice Worchester, parties of the first part; and A. H. Barber & Company a corporation organized and existing under the leave of the state of Illinois, and its stockholders named as follows — A. H. Barber, W. S. Goodhue, S. D. Flood, M. H. Church, Mrs. Lot. A. Caurch Mrs. J. M. Goodhus, A. H. Goodhus, E. J. McAdam, Frank Miller, and Mrs. K. M. Pearson; and P. B. BARGO a COMPANY of Lake Mills, Wisconsin, a corporation orgamized and existing under and seconding to the laws of the state of Wiscontin, and its individual stockholders as follows:—F. B. Fargo, E. J. Fargo, and A. H. Wegeman; and F. R. FARGO & COMPANY of St. Paul, Munesota, a corporation organized and existing under of St. Paul. Minnesots, a corporation organized and existing under and according to the laws of the state of Minnesots, and its stock-builders as follows.—F. B. Pargo, E. J. Pargo, A. H. Wegenner, J. C. Crump and Fannie N. Crump; and CDRNISH CURTIS & GREENE MANUFACTURING CO. of Pt. Atlanton, Wisconsin, a sopporation organized and existing under and according to the laws of the state of Wisconsin, and its individual stockholders as follows.—H. H. Cartis H. H. Cartis, Administrator of the estate of D. W. Cartis, deceased, W. W. Cornish, R. R. Cornish, Mas. E. S. Chrisch, A. R. Conklin, W. W. Cornish, administrator of the estate of Mrs. May Heming, deceased, George A. Prate, T. L. Valerius, N. S. Green, Edward Ransin, Warner Rankin, Mrs. Jeanetts Greene, Leanette Gosselle, Arthur R. Hoard, H. C. McMillen, Mrs. Frances McMillin, and S. S. Swater, and CORNISH, CURTIS & GREENE COMPANY of School, Minnesota, a corporation organized and existing under and according to the laws of the date of Minnesota, and he individual stockers.

toking as informed in H. Control C. A. Prest Landor Constitution of information of CORNISE (CORRESC CORRESC). It Commits and the CORNISE (CORRESC CORRESC) With VIPA OF PREST COMPANY, and C. P. Rife and Prof. Medical Construction of the first committee of C. P. Rife and Prof. Medical Construction of the first committee of the measurement of C. P. Rife Construction of the measurement of C. P. Rife Construction of the measurement of the construction of the construction

PATTINGSSETH, THAT, WHEREAS, the said parties of the are part propose to increase the capital stock of the and Creamery Package Manufacturing Company, so as to enable it to have additional stock to the amount of \$1,600,000 thereby making its total capital stock \$2,000,000 and has proposed to said parties of the second part, to buy out the Creamery Supply and los Machinery business or department of said A. H. Barber & Company and also to buy all the property belonging to the other corporations and firms hereinbefore named, except the farm property located in and near Ft. Atkinson, Jefferson County, Wisconsin, consisting of about one hundred seres belonging to said Cornish, Curtis & Greene Manufacturing Company together with such property belonging to such other persons, firms or corporations as may hereafter decide to become parties to this agreement under the terms herein contained. But no other firm or corporation shall become a party to this agreement, except upon the unanimous consent of C. M. Gates, A. H. Barber, F. R. Fargo and H. H. Curtis, and such persons are hereby choses; as a committee to decide upon the value of any property that may be purchased from such person, firm or corporation so becoming a party to this agreement.

Now, therefore, said Creamery Puckage Manufacturing Company hereby agrees to purchase from said corporations and firms of the parties of the second part, all the respective properties owned by said several corporations and firms excepting as aforesaid, consisting of real estate, plants, machinery, fixtures, patents, notes, contracts, book accounts, good will, and all other property of every kind and description belonging to the said several corporations and firms, except however, that in the case of said A. T. Burber & Company, such purchases shall include only the creamery angiver and refrigerating business, or department and the accounts and other property appertanting discrete; such pirchase to be made upon the terms and conditions hereinsiter set forth:

First: All said book accounts and bills receivable shall be under hereby, guaranteed by the individual speckindden of the company and by the individual members of the firm, which shall sell and assign the same to said Commenty, Receivant for the control Comment, and in the case of all unscentred accounts and some which shall not be paid to the paid Creamery Rackage Manufacturing Company within six

contribute from the data of the analysis of transition of all processives of the control test of the individual test that the states of the analysis of the said corporations and firms so have acceptable and test the same, and all section notes and accounts, which all no be paid within one year from the date of such assignment of the said test same; and test got to and become a debt of the individual stockholders and testiles of said corporations and firms so having guarantees the same; it being expressly understood and agreed that full and complete lasts of all such accounts and bills receivable shall be delivered by said corporations and firms, of the parties of the second part, to said Creamery Package Manufacturing Company. And it is fluidest agreed that all of the book accounts and bills receivable both secured and unsecured of said Creamery Package Manufacturing Corporations shall be listed as a part of its assets under this agreement shall be and are hereby, in like manner guaranteed by the individual stockholders of said corporation, and, if not paid within the period of six months or one year, respectively, shall be charged back to, and become a debt of said individual stockholders to said Creamery Package Manufacturing Company.

Second: All merchandise owned by said Creamery Package Manufacturing Company, and by said corporations and firms of the parties of the second pact, respectively covered by this agreement shall be involved at prices to be agreed upon and determined by G. F. Belknap, A. H. Wegeman, J. Y. Sawyer, S. S. Swavey, P. J. McNish, as a committee acting for and on behalf of all the parties to this agreement, and all unexpired insurance, stationery, etc., shall be valued at costs.

Third. The med nature buildings machinery, thereway pureus, good will and all other assets, if any, of every kind and descriptions not be eightfore mentioned, indringing to said several corporations and firms of parties of the second part, which said Cecamery Package Manufacturing Company hereby agrees to purchase, shall be assigned, transferred and delivered to said Creamery Package Manufacturing Company, and as to real estate, buildings, unechinery, fixtures and tools, at the respective prices stated in the schedule hereto attached and many a Schedule "B", which is made a part of this agreement; and the tool coate, building, machinery, fixtures and tools owned by said from a factory Manufacturing Company shall be appraised and coat at the second best therefore as above in said Schedule "B"; but the interest case good-with out parties and good-will me being

ations, which are parties of this agreement, the value of the same small, before any stock is insued to any of the parties to this agreement by determined by C. M. Gotes, A. H. Barber, E. J. Farge, S. S. Sykert, and F. J. McNish as prostructure batchy appointed for that purpose.

Pours) It is hereby munually understood set agreed that the lighthines of the said Creamery Proteins Manufacturing Company and of the survivor compositions and figure of parties of the second-part small be assumed by end Creamery Proteins Manufacturing Company; we amounts of said habilities to be end they are leady parameter by the stockholders of the said several corporations or steakers of said firsts including the said Creamery Package Manufacturing Company who shall also fathash to said Creamery Package Manufacturing Company who shall also fathash to said Creamery Package Manufacturing Company of life of their respective delts and liabilities, and they hereby question there are excrete these of and in case additional valid liabilities shall appear as any time which sid Creamery Package Manufacturing Comp page at any time which told Creamery Puchage Manufactor by shall pay the macount paid by said Creamery Facing ing Company, in settlement thereof, shall be a debt from the stock-isolders of said Creamery Package Manufacturing Company and of the mid other corporations and members of firms with which said liability originates, to trid Greaturery Package Manufacturing Company, and may be dedicated from any moneys which may be or become day, or owing to such second-does or members of such farms, a dividually of otherwise, pro roce, including the present excellent term of and Greaturery Package Manufacturing Company. It is further manufacturing Continuers Package Manufacturing Company.

Sally appeared that the present officers of the said Community Fusion, Manufacturing Company shall, before the consumation of this age mean furnish to As H. Bather, so the representative of all of the financial corporations of the parties of the encount part, a doly certain list of all the habilities of said Creasery Package Manufacturing Co. party. It is further marrially access that said Greanery Package Man-mactiming Company mediums and agrees to carry out all the contracts existing at the date of the consumerant of this agreement between any of the parties of the scottal part herein and third persons including the contract of employment between A. H. Barber & Company and S. D. Hood, in the conduct of the business assessmed in this contract of 6. D. Hood, in the conduct of the business concerned in this contract deif in its judgment best, concern the same without liability or cost to any
of the parties of the second part, and save the latter farmless sharefrom this is not effective any such contract relations and parts, of the
latent parts have the power as terminate the name if requested so to
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contract above referred to, other caterolled as basels provided for,
shall be listed and property stangard to takk Crymnery Package Massifactoring Company, at the time of the communities of the agreeThese is in Archer mountly agreed by and between all of the number that is the number of the number

Sinth: It is further mutually inderstood as diagreed by and between the purties hereto, this each of the corporations and firms, purties to this agreement, shall, as soon as this agreement shall be algued by the parties thereto, proceed to take an inventory of all the property and assets of every kind excepting such as is included in said Schedule 'IB' owned by them, respectively, and is case this agreement is finally communited the property shows in such inventories remaining at the time of such commutation including such as may purchased or manufactured since the taking of such inventories, shall make to and be the property of such Createry Package Manufacturing Company, and said Createry Package Manufacturing Company shall assume all the fabilities contracted by any of said parties, and shall have the benefit of the proceeds of all transactions made or carried on by any of said parties, in the proper conduct of their business, subsequent to the taking of said inventories. And that is the taking of the inventory of the property of any one of said firms or corporations, there shall be one man selected by such firm or corporation to see for it in the taking of such inventory, and with him shall set one other person in the taking of such inventory, and with him shall set one other person in the taking of such inventory, who shall not be a stockholder in or a member of or in the employ of the farm of corporation whose property is using inventoried; and in case the two persons thus selected exmot agree as to any item of property, then they shall select a third person not interested in said matter, and the decision shall select a third person not interested in said matter, and the other firms or corporations, parties to

Seventh: In consideration of the agreement herein contained, and of the mutual covenants to be performed by all the parties bereto, said Oceanery Package Manufacturing Company and its stockholders hereby agree to have its capital strick increased as hereba before provised, and to do all things necessary to a complete performance of this agreement on its part, and the said stockholders and members of said firms of parties of the second part hereby severally significate and agree that they will obtain such action by the various corporations and firms of which they are members, as will vest the respective properties and other assets, so proposed to be parchased by the said Greamery Package Manufacturing Company, in said company, as soon as the proper action can be taken yo their respective corporations and firms, after the increase in the capital stock of said Greamery Package Manufacturing Company shall have been fully accomplished and they do hereby respectively guarantee the fulfillment of all the atpulations better contained and the performance of all things which may be required for fully carrying out the provisions of this agreement on the part of the corporations and firms represented by early accompany to all their real estate and other property, with all the muniments of title requisite and necessary therefore, including tail covenants of warranty.

Eighth: It is further agreed as a part hereof on the part of all the

production of the half Creamery Factories than for my Compling that they are reported by the self-comparation the coefficients for the self-comparation the coefficients for the self-comparation and the self-comparations, and that the self-coefficients is self-comparation, and that the self-coefficient self-coefficient self-coefficients are self-coefficients.

the U.S. The fastlier intensity conceptored and agreed by affect to the parties bareto that after the surrenter of sale carefficies of a contract for an attention and the increase in said capital stock as merciate fore provided for, there share to distributed between and intensity foreign studitioniers of said Creamery Factage stampter turing Company of said capital stock as mercaned, the share of stell spital stock for every one hundred dollars in the fixed at feeren placetic of the property and assects of every land and description owned by tall Creamery Factage attendant uning Company is the fane of the continuation of this agreement, such stock to be distributed among said statisticities and stockholders, respectively, in said Creamery Package Manufacturing Company are also stock town field and owned by said stockholders, respectively, in said Creamery Package Manufacturing Company acres where any said of consideration of the specifics these factors of the said Creamery Package Manufacturing Company acres we waste any and all prior right they may have to subscribe for, and receive, atoh increased capital stock of the said Creamery ractage frantifications. facture of and receive, such increased capital stock of the said Creamery facture of antifacturing Company, as herein provided for, is being intended and indenstood by all the parties to this agreement that each of the present thembers of the firms and each of the present street lookers of the different corporations, who are parties to this agreement, shall stand upon the same basis as to subscribing for, and have issued to them, respectively, shares of the capital stock when the same thall have been increased in the said Creamery Package Manufacturing Company, pro rate according to the value as because fixed, of the property of every kind and description owned by said several firms and corporations and the respective interests held in the same by the capitalism manufacture. corporations.

TENTH: It is further maxisally agreed and understand by and servers all the parties hereto, man after the surrender of said certificate of the taptage state as aforesent, and the increase in said capital to an heretibe fore provided. In: there shall be distributed between and sense to the individual seculateders of all of the corporations, more individual members of all the firms, parties of the second part, out of said capital stock to increased one share to every one handred dollars in value fixed as herein provided, of the property are every or contracted on and corporations and firms, so sold and transferred

to said Creamery Package provided, said stock to be a of said on herations said the prospective leadings of story females inufactoring Company, as hereinbefore rided between the different stockholders there of said-fings in proportion to their aboved or purctions and interest in said

TELEVENTE: Baza of the capital much of said Creamery Packets of Manufacturing Company as shall not be sented to be shockholders at bereinbefore provided for, shall sentian in the treatily of said of potation, and be disposed of according to law as the Board of Directors of Said Creatnery Package Manufacturing Company may determine the

TWELFTH: It is further mutually understood and agreed by and between the parties bereto, that a sufficient amount of the capital track to be taken out of the allotment to the several stockholders of the said Gramery Package Manufacturing Company, in the same shall exist after the re-organization as become grovided for, to cover all accounts and bills receivable, the payment of which shall have been gearmanted as bereinbefore provided for, shall be field by said Creamery Package Manufacturing Company with the dividends thereon, as collisteral security until anch accounts and bills forestrable shall have been paid provided that at no time shall said Greatnery Package Manufacturing Company vitam, as such collecteral security on amount of stock and dividends in excess of two hundred per cent in per value of the amount due on said account and bills receivable; it being understood that the stock to be so remained shall be in each instance that shock of the stockholders of the compositions or forms whose accounts and bills receivable shall have been an guaranteed.

THIR TRENTH: It is further susually agreed by and between all the parties derive that after the capital stock of said General Package Manufacturing Company shall have been increased as here abefore provided for, and all the property of the said corporation and firms, of the parties of the second part shall have been transferred in agad Crosmery Rachage Manufacturing Company, as have abelieved to redd for there shall be instead by said Crosmery Phologe Manufacturing Company, three Aundred thousand dellars, (\$400,000) in first avortage, gold books hearing interest state case of six per condition are accounted by and Crosmery Phologe Manufacturing Company, three Aundred thousand dellars, (\$400,000) in first avortage, gold books hearing interest state case of six per condition are accounted by the directors of and Crosmery Package Manufacturing Company, or otherwise sand by them in tailing money or farmithms society as many be found accountry or must edizantageous in the proper conductor manufacturing in the proper conductor of manufacturing in the proper conductor manufacturing in the proper conductor manufacturing in the property of the case of the language of the Crosmery Package Manufacturing in the property in the property of the case of the

tisting Campacy.

DOUD INDICTIFY It is further agreed that, upon the receipt he contributed members of said firms and by the stockholders of said corporations, of the parties of the second part, of the shapes of the capital for our and Creams y fittings. Manufacturing Company, as here a revoke for test in widthal members of said from shall dissolve their respective to seatmenthic had bettle up and adjust all particular nations. If not that one not covered by this agreement, and said stockholders of said corporations, other than those of said A. H. Barber & Company, shall immediately take rock steps as me required by his to dissolve and shall dissolve their respective corporation, and shall turnish to the directors of said Creamery Package Manufacturing Company, a certified stop of their dissolution; it being the interpand outpose of this agreement that each and every one of said corporations other than said A. H. Barber & Company, shall be dissolved and case to exist as a corporation, and the individual stockholders of said to research turney guarantees the fulfillment of this agreement by their respective corporations.

TIPTEENTH: In arriving at the aggregate value of all the property of the respective corporations of firms represented in, or who are parties to this agreement, the limbilities to his deducted from its gross meets, and the distribution of stock shall be upon the basis the not value of mich property only.

SIXTEENTH: It is further agreed that after said firms and corporations shall have been dissolved as hereinbefore provided for, the business of said Creamery Package Manufacturing Company disall be conducted and carried on at the various places unless otherwise determined by the board of directors of and Creamery Package Manufacturing Company by a two thirds vate thereof, where said firms and oppositions are now located, respectively, in the names of said firms and corporation respectively, unless some other name shall be determined upon by the directors of said Creamery Package Manufacturing Company, by said C. E. Hill, and R. J. McNiak now comprising the partnership of C. E. Hill & Company of Kanows City, Missouri; and y T. E. Fargo, R. J. Fargo and A. H. Wegeman, in the said F. E. Fargo & Company of Lake Mills. Wisconsin, and by W. W. Comish, Swaney and H. H. Carris successoiders of said Comish. Ourtis & Green Manufacturing Company, of R. Altimon, Wisconsin, in their additional connects to such agents of said American Package Manufacturing Company by the person who is so, a stocknoticer in said terms.

day received by the feet by matter and management of ment of each Oceaniery Parisage Management Company, a soft the three placer shows beauty, that Kanest Dity Management of the three placer shows beauty, that Kanest Dity Management any one of the three places above named, vir.: Kaneas City, Missouri, I also Mills, and P. Affinson, Wiscousin, shall as such agents have authority, subject, however, to the control of the president of the board of directors of the send Creamery Package Manufacturing Company to hire and discharge men and to buy, sell, manufacture and deal in the goods wares and merchandise bought, sold, manufacture and deal in by said Creamery Package Manufacturing Company, but as the agents of said Creamery Package Manufacturing Company, though the business is done in the present names of the respective firms and corporations, or any other name, Such agents that keep accurate books of account of all the business so done or carried on by them at either of the three said places named above, and shall make in writing and send to the officers of the Creamery Package Manufacturing Company, trial to the officers of the Creamery Package Manufacturing Commany, trial balances of their said books every month, and such other reports as may be required by the heard of directors of said Creamery Package Manufacturing Company; and said Creamery Package Manufacturing Company hereby agrees to guarantee in writing by contract duly made such agents against any and all loss or liability arising out of the proper constinct or management of the business of said Creamery Package Manufacturing Company by them as such agents. But the provisions of this section of this contract, shall not, except at the option of said Creamery Package Manufacturing Company, apply to the said F. B. Fargo & Company and the said Cornish, Curtis & Greene Company, both of Sc. Paul, Missesson, and as to the said. St. Paul, Minnesota; and as to the said A. H. Barber & Company, the persons by whom and the name under which the business of said Creamery Package Manufacturing Company shall be transacted by the said A. H. Barber & Company, shall be determined upon hereafter by said A. H. Barber and said C. M. Gates, it being understood and agreed that the said A. H. Barber & Company under such name to be agreed upon as aforesaid, as a corporation, shall act as an agent for said Creamery Package Manufacturing Company, in the branch of the busi-sess new conducted, by A. H. Barber & Company covered seas over conducted, by A. H. Barber & Company covered by this agreement, and shall have the same power as any of the other agents above named and be subject to the same duties and obligations with the same guarantee against liability. The manager for each of such agencies and the rank of each of the other persons conted therewith, to be designated by the board of directors of the said Creamery Package Manufacturing Company

SEVENTEENTH: In the transfer of the property of the several parties, persons and corporations herein provided to be transferred, it is expressly stipulated and agreed that all the individuals who shall

the table of the second of the on this agreement shall execute to the fall Greenery Fact up. If is included to stand agreed that acid Commery Package Manufacturing Company small not commence or institute any sant for any past infringement of any of said patents against any one of the individuals, firms or corporations that are parties to this agreeness. And its If the passes of any of said passes against key one of the individuals, firms or corporations that are parties to this agreement. And in consideration of the foregoing said Creamery Package Manufacturing Common theory agrees to and does hereby women and become of spendille for the lithation note pending or say that may become the commonced by the Owatoma Manufacturing Company, a texporation organized and accoming under the laws of the state of Minnesota against and F. B. Furgo & Company, or said F. B. Furgo individually, for an alleged infringement by usid F. B. Furgo & Company or by said F. B. Furgo of certain combined charm and butter worker patents alleged and claimed to be owned by said Owatoma Manufacturing Company. All exposes obviously shall be home by and B. B. Burgo & Company and in one any judgment shall be home by and F. B. Furgo & Company, and in one any judgment shall be recovered by said Owatoma Manufacturing Company, and in one any judgment shall be recovered by said Owatoma Manufacturing Company against said F. B. Furgo & Company to Against said F. B. Furgo & Company or Against said F. B. Furgo & Company to Against said F. B. Furgo and any money collected thereon from said F. B. Furgo & Company and any money collected thereon from said F. B. Furgo & Company and the manufacturing Company and the manufacturing Company and the manufacturing Company and the present special solutions of and F. B. Furgo a Company and the land size harmless the said F. B. Furgo & Company and F. B. Furgo individually and the present special solutions of and F. B. Furgo & Company and the individual stockholders of said F. B. Furgo & Company and the individual stockholders of said F. B. Furgo & Company berefore the based of directors of the said Createry Package Manufacturing Company and the individual stockholders of said F. B. Furgo & Company berefore the treat of directors of the said Createry Package Manufacturing Company. the in further regress that he care such F. D. Perpe on seed R. D. Dear in Comments we specified persons for their or such comments obtain more to the communities of this approximate supplies the right or satetion of the comment by him do from their in any of the patents above to further the comments of the patent of the object star and relative condition. Supplies and manufactured to the Comment Declarate Material Sciences Comments.

ERGEPTRICATURE. It is further understood and agreed that upon the consumation of this agreement three of the seven present members of the board of directors of said Creamery Package Manufacturing Company, viz. E. R. Rimbal, G. H. Higgs, and George Walker shall resign as then directors, and there that he elected in their plane the fedoving named persons. At H. Burbey, F. R. Fargo and H. H. Curris, and that C. M. Gates shall continue as president of said Creamery Parksage Manufacturing Company; and that W. W. Sherwin shall seeign as contrary, and that said George Walker shall resign as treasurer and be chosen as accreaty and D. H. Roe shall be chosen as treasurer and be chosen as accreaty and D. H. Roe shall be chosen as treasurer of said Creamery Package Manufacturing Company; and that the by them of said corporation shall be so modified as to provide for three vice-presidents of said corporation, and that D. E. Woodt the present integral and there shall be elected as the three vice-president A. H. Barber as first vice-president, F. B. Furgo as second vice-president and H. H. Curris as third vice-president.

NINETRENTH: It is further manually agreed by and between all of the parties to this agreement that of the Spround gold bearing blocks to be issued as iteration for provided for the amount of Spround shell be distributed as follows: Sproud among the present stockhold as of used Creatiery Package Manufacturing Company—byo data, as cording to their respective present holding is said corporation. Sproud among the stockholders of said F. B. Pargo & Company of Lake Mills, Wisconsin, pro rate, seconding to their respective holdings in said companying an east company of Fe. Atkinson, Wisconsin, seconding to their respective holdings in said company of Fe. Atkinson, Wisconsin, seconding to their respective holdings in said comparation. Said borsis shall be paid for by the assigning and transferring by said componitions above named to said Creating Package Manufacturing Company all interests in patients not owner by said corporations to the nation value of all of the patients owner by said corporations at the total value of all of the patients owner by said corporations and transferred to said Creating Package Manufacturing Company as provided for in other schilly itsers of this contract in this contract.

and capital stock of said Creamery Package Manufacturing Company after its mock shall be increased as hareinstates provided for shall not be housed as said sum of \$50,000 in value of said patents, but said patents shall to the anterpret of \$40,000 fe paid for its said bonds of said Creamery Package Manufacturing Company; and the capital stock of said Creamery Package Manufacturing Company as hereinbefore provided for All other provisions of this contract are hereby modified so far as necessary to carry out the provisions of this subdivision of this contract.

betheen the DeLaval Separator Company, a corporation of New Aerecy, and said Creamery Package Manufacturing Company and also active errors of Laval Separator Company and said F. B. Parge & Company, of Lake Mills, Wisconsin, and said F. B. Farge & Company of St. Rani, Minnesota, and also a contract between aid DeLaval Separator Company and said A. H. Barber & Company, of Chicago, Illinois, whereby said last named four corporations are bound, arrong other things, in writing, to act as such agents of said DeLaval Separator Company is the sale of the said De Laval "Power" or "Creamery" and factory sizes and carles of centrifugal cream separators, in certain territory specified in said-contracts.

NOW THEREFORE, he is hereby mutually agreed, by and between all of the parties to this agreement, that this contract shall not interfere with the carrying out of buil contracts with the said De Laval Separator Company by the said F. R. Fargo & Company, of Lake Mills, Wisconsin, and the said F. B. Fargo & Company, of St. Paul, Minnesots, and by the said A. H. Darbes & Company, of Chicago, Illinois, and that the said F. B. Fargo & Company of Lake Mills, Wisconsin, and F. B. Fargo & Company, of St. Paul, Minnesots, shall continue as corporations until the completion of said contract, according to its terms, unless before the expiration of the term of said contract, conemit be obtained from the said De Laval Separator Company that all of the contracts now existing between that company and the said Creamery Package Manufacturing Company. A. H. Barber & Company, F. B. Pargo & Company, of St. Paul, Minnesots, be executed by said Creamery Package Manufacturing Company, with like effect in all respects as if each contract were being carried on and executed by the original parties thereto, and when such consent is no obtained then all the other provisions of this contract as to the dissolution of the haid F. M. Pargo & Company, of Lake Mills. Wisconsin, and F. B. Fargo & Company, of Lake Mills. Wisconsin, and F. B. Fargo &

provisions of this subdivision of this con

And it is further mutually agreed that such consent to the medica-tion of said contribute with the said De Laval Separatus Company be ob-tained at the enrillest disc possible. During the forecaston of the said contracts between said De Laval Separatus Company and the said A. H. Berber & Company and the said P. Br Kargo & Company, of Lake Mills. Wisconsin, and P. B. Fargo & Company, of St. Paul, alimentate, by said three last named corporations, they shall render stittements and accounts in writing to the said Cresmery Package Manufacturing Company of the business done by their under said contracts with the said De Laval

TWENTY-ONE: It is further mutually understood and agreed by and between all the parties to this contract that said D. H. Roe, W. S. Goodhue, E. J. Fargo, S. S. Swasey and F. J. McNish be and ther hereby are appointed as inventory committee, whose business shall he to have the general oversight of the taking of and provide for the manner of the taking of the inventories hereinbefore provided for and to settle and decide any question of dispute that may arise as to the value of any particular asset of any one of the firms and corporations parties bereto where such matter is not covered by some other providion of this contract.

TWENTY-SECOND: Nothing in this contract shall be construed to make one party thereto liable for the fulfillment of the contract on the part of any other party.

TWENTY-THIRD: It is further mutually agreed by and between all the parties hereto that as to any application now pending for any patent made by any one of the parties to this contract or any machinery or other articles or appliances pertaining to the business carried on by said Creamery Package Manufacturing Company, the patent, if any, when issued shall be assigned to said Creamery Package Manufacturing Company, said corporation to pay all expenses of taleing out and transferring said patent or putents.

TWENTY-FOURTH: It is further mutually agreed by and between all the parties hereto that the expenses of the different firms as corporations, parties hereto, including all the attorneys' fees up to and including the signing and execution of this contract shall be paid by the firm or corporation respectively that may have incurred the same, and not by the said Creamery Package Manufacturing Company, but the few velicits must be paid to the secretary of state of the state of illinois as a condition of more using the capital state of stale Grammery because Manufacturing Company and all expenses incorred by stale Creamery Emberge Theoretics deed Company unbecapant to the uncertain of this amende in securing the amendments of its articles of incorporation; and angle changes if any as may be deeped necessary and stage in its by-laws and the proparation of and insting of the new emint must and brank harmshering provided for shall be born and only by the said Creamery Pickary Manufacturing Company, as it shall eight after the increase and issuing of and capital stock and the full confinentiation of this contract. It is further agreed that before and Argicles of Jeography may amended and the breaker of said too. and Articles of Incorporation are amended and the by-laws of said cor-poration are modified a copy of the proposed change in each case shall be furnished to each of the firms or corporations parties to this agreebe furnished to each of the firms or corporations parties to this agreement, except said Creamery Package Manufacturing Company, in time to enable such other firms and corporations to examine the same sefere the same are completed or adopted but any expenses for aftercapt force in committing the same shall be born by the firm or corporation incorring such expense, and that said C. M. Gates, H. J. Perris, W. W. Sherwin, D. E. Wood, four of the present directors of the said Creamery Package Manufacturing Company, and the four who are to continue in office as fierein provided, and P. B. Fargo, A. H. Barber, and H. H. Curtis, the three persons who are to be elected as new directors as herein provided shall, finally determine what changes shall rectors as herein provided shall, finally determine what changes shall be made in said by-laws; and the above named persons shall be a comwith full authority to employ such attorney or attorneys as may is necessary in the doing of the work referred to in this subdivision of this contract, namely: the securing an amendment to the Articles of Incorporation of said Creamery Package Manufacturing Company, as berein provided, and such change in its by-laws as may be determined upon and in this preparation of and tending of the new capital stack and bond of said Creamery Package Manufacturing Company as acrein provided. It is further agreed that each of the firms and obtainations, parties bertin, other than said Greamery Package Manufacturing Company shall formish at their own expense to said Greammeteritig Company shall furnish at their own expense to said Oremany Package Manufacturing Company an abstract of title of any real estate transferred by either of said firms or corporations to the said Oremany Package Manufacturing Company under this agreement, but the expenses if any, of examining such title or titles by said Oremany Package Manufacturing Company shall be paid by said corporation and it is all entire after the re-organization as herein provided, and said Oremany Package Manufacturing Company shall furnish to A. H. Bacter at true a representing all of the firms and corporations parties table agreement other than the said Oremany Package Manufacturing Company Package Packa infacturing Company as abstract set sets of all the real estate owned by said Creamery Probage Manufacturing Company as an asset covered by this agreement and anti-Creamery Package Manufacturing Company shall pay the expenses of examining said shoract so bunished by it to said Barber.

TWENTY-FIFTH. It is further mutually agreed by and between all of the parties hereto that of the net profits from the business of said Creamery Package Manufacturing Company at least one-half thereof shall be paid and distributed each year among its shareholders unless otherwise determined by uranimous vote of the board of directors of the said Creamery Package Manufacturing Company.

In Witness Whereof the "espective corporations parties hereto have caused these presents to be executed in their respective corporate names by their respective presidents, attested by their respective secretaries and their respective corporate seals to be hereto attached; and all the other parties to this agreement have executed the same under their hand and seals the day and yes first above written.

(Signed by all the parties thereto)

# SCHEDULE "B".

d Tools	Total
Machinery &	Individual Balance.
	<b>经现代的现在分词</b>
\$23,425	\$123,425
4,970	4,970
13,800	31,603
	500
20,370	39,820
078	1,900
经运动的 医阿勒氏性神经神经神经神经神经神经神经神经神经神经神经神经神经神经神经神经神经神经神经	101011
	33,350
	11,000
13,000	
\$91,640	5004.000
Stocker .	\$10,000
	80,010
	Machinery & Fixtures. \$23,425 4,070 13,800 975 6,540 8,360 13,000

St. Pani, Minn, Access, and a		
Cornish, Curtis & Greene Mig. Co	\$45,000	\$95,000 .
Pt. Atkinson, Wis \$55,000 St. Paul, Minn.	\$46,000	\$107,000
\$55,000	\$49,000	\$104,000
A. H. Barber & Co.— Chicago, III	\$20,400	\$20,400
Kansas City, Mo	\$3,000	\$3,000

### EXHIBIT A (1).

This agreement made this 18th day of March, 1898, by and between the Cornish, Curtis & Greene company of St. Paul, Minnesota, a corporation organized and existing according to the laws of the state of Minnesota, and J. H. Cornish, parties of the first part, and the Creamery Package Manufacturing Company, a corporation, organized and existing according to the laws of the state of Illinois, party of the second part, Witnesseth:

That Whereas a certain contract was entered into by and betten the parties hereto and sundry other parties, on the 24th day of February, 1898, in accordance with which, the said Cornish, Curtis & Greene Company in its corporate name, and by its individual stockholders, including the said J. H. Cornish, agrees to sell out its entire business to the party of the second part, and receive payment therefor in the stock of the party of the second part at a par value of \$100.00 for each \$100.00 in value fixed as provided in said contract above mentioned; and

Whereas. The party of the second part has agreed to increase the capital stock in order that it may carry out the covenants of the above mentioned contract, but in so doing is necessarily governed by the requirements of the laws of the state of Illinois, in accordance with which from four so six weeks must intervent before the said new stock will be ready to be issued; and

Whereas, The total amount to be paid by the party of the second part for the entire plant, machinery, tools, fixtures, patents, notes, contracts, book accounts, good-will, and all other property of every kind and description, not including cash of Cornish, Curtis & Greene Company has been determined in accordance with the provisions of the above mentioned contract to be about \$17,779,04, which amount, however, is subject to correction by the price or inventory committee or by mutual consent of both parties hereto,

but the formal transfer of which said property is not to be finally made until the new stock above mentioned is ready for issue; and

Whereas, It is provided in the above mentioned contract, that all business done by the said Cornish, Curtis & Greene Company shall be considered and held to be the business of the Creamery Package Manufacturing Company on and after March 1st, 1898, and the said Creamery Package Manufacturing Company must in consequence thereof be subject to all losses and expense incurred and accept all contracts made in the conduct of said business after March 1st, 1898; and

Whereas, It is further provided in the above mentioned contract that immediately upon the formal transfer of all its property to the Creamery Package Manufacturing Company the said Cornish, Curtis & Greene Company shall dissolve its corporate existence and thereafter the business of the Creamery Package Manufacturing Company in St. Paul, Minnesota, shall be conducted by the said J. H. Cornish, as agent or employee of the said Creamery Package Manufacturing Company, under the name and title of the Cornish, Curtis & Greene Company, subject, however, to the control of the president or the board of directors of the Creamery Package Manufacturing Company; and

Whereas, In accordance with a certain other contract, the Creamery Package Manufacturing Company has agreed to employ the above mentioned J. H. Cornish and to pay the salary therein fixed from and after March 1st, 1898; and

Whereas, In view of the fact that the business conducted by the Cornish, Curtis & Greene Company is in point of fact the business of the Creamery Package Manufacturing Company from and after March 1st, 1898, it is the desire of said, Cornish, Curtis & Greene Company and its individual stockholders that the president and board of directors of the Creamery Package Manufacturing Company shall control and direct said business to the fullest extent possible without jeopardy to the interests of the parties of the first part; and

Whereas, It is absolutely essential to the best interest of the Creamery Package Manufacturing Company that it have the right and authority to exercise such control and direction in order that there may be proper co-operation and harmony between the various departments and branches of its business.

Now, Therefore, In consideration of \$1.00 each to the other in hand paid, the receipt whereof is hereby acknowledged, and of the foregoing premises, and of sundry other valuable considerations.

the parties hereto hereby agree to gether as follows:

First: The said Cornish, Curtis & Greene Company hereby leases in the said party of the second part, from the date of the execution of this contract until the consumation of the contract first above mentioned; the place of business now occupied by said Cornish, Curtis & Greene Company with all machinery, tools, fixtures and appliances pertaining thereto.

Second: The said Cornish, Curtis & Greene Company further agrees that from and after the signing of this contract, it will, in the management of its business, follow the directions and control of the president of the Creamery Package Manufacturing Company, or of the persons named in the contract first above mentioned, to constitute its board of directors after the increase of the capital stock, it being the intention of this agreement to transfer the management and control of the business of the said Cornish, Curtis & Greene Company to the said party of the sacond part as fally and completely as if the actual assignment and transfer had already been made, provided, however, that the said party of the second part shall do nothing in its management and control of the business to diminish or jeopardize the property and assets of the said Cornish, Curtis & Greene Company, and shall have the right to refuse to do anything of that nature.

Third: For the purpose of carrying out the provisions of subdivision 2 of this contract, the said Cornish, Curtis & Greene Company agrees to make, and does hereby make, J. H. Cornish a committee to carry out the provisions of such sub-division 2, of this agreen. It and hereby empowers said J. H. Cornish to consult and co-operate with said Creamery Package Manufacturing Company in all matters pertaining to the business of the Cornish, Curtis & Greene Company as provided in sub-division 2.

Fourth: The said J. H. Cornish hereby agrees for himself that

he will, from and after the execution of this contract in the conduct of the business of the Cornish, Curtis & Greene Company act as agent of the Creamery Package Manufacturing Company and as such agent will co-operate in every way with the said Creamery Package Manufacturing Company in the management of said business, and will accept and be governed by the direction and advice of the president or heard of directors of said Creamery Package Manufacturing Company, or of others to whom he or they may divergate authority, and said J. H. Gornish further agrees faithfully

and hopestly to conduct said business in all its departments and to loop accurate busins of account and records of all business done or carries on by him and to make in writing and send to the officers of the said Creamery Package Manufacturing Company such statements and reports as they may from time to time call for.

Fifth: For the purpose of securing the largest efficiency in the direct management of the business at St. Paul-Minnesota, and of definitely fixing responsibility, the Creamery Package Manufacturing Company hereby designates [. H. Cornish general manager of its business at that point, and that said []. H. Cornish hereby accepts the foregoing arrangement governing his rank and authority and agrees until otherwise instructed to recognize and be governed thereby.

Sixth: It is understood and agreed that from and after the consumation of the contract first above mentioned at which time the cheolute ownership and control of the plant and business of the Cornish, Curtis & Greene Company vests in the said Creamery Package Manufacturing Company of St. Paul, Minnesota shall continue to be conducted under the name and style of the Cornish, Curtis & Greene Company as heretofore, and the said J. H. Cornish hereby agrees to carry on said business under the said name and style and in so doing to act solely as agent of the said Creamery Package Manufacturing Company and to be governed and controlled in all respects by such company or its duly authorized officers or representatives.

Seventh: The Creamery Package Manufacturing Company hereby guarantees the said J. H. Cornish, against any personal loss or liability arising out of the proper conduct of management of the business of the Creamery Package Manufacturing Company.

Eighth: The said J. H. Cornish, further agrees for himself that he will not at any time or in any manner draw money for his personal accounts, or incur indebtedness to the Creamery Package Manufacturing Company in excess of the amount of his yetriy salvary; and if at any time when dividends are payable on the stock of the Creamery Package Manufacturing Company it shall be determined or accertained that the said J. H. Gornish is indebted in any amount to said Creamery Package Manufacturing Company by beyond any salary by him earned at that time, said excess shall be deducted from the dividends coming to him from his stock and the balance, if any, shall be paid to him.

Ninth: Any advances of money made to said Cornish, Curtis & Greene Company after March 1st, 1898, and prior to the final

consumation of the contract first hereinbefore referred to shall be used solely for the use and benefit of the Creamery Package Manufacturing Company, and its business; and in case the said contract is not consummated any amounts of money so advanced shall become a debt from said Cornish, Curtis & Greene Company to said Greamery Package Manufacturing Company, and shall be payable in ten days from the date of notification of failure of consummation of said contract, and all such shall bear interest at the rate of 6 per cent per annum from the time when they may have been advanced respectively.

Tenth: Said Creamery Package Manufacturing Company or its duly authorized agents or attorneys shall have the right to examine the books or accounts of said Cornish, Curtis & Greene Company from March 1st, 1898, to the date of the final consummation of the contract first hereinbefore referred to, and until all advances by said Creanery Package Manufacturing Company made shall have been repaid by said Cornish, Curtis & Greene Company in case said contract is not consummated.

In Witness Whereof, The respective corporations, parties hereto, have caused these presents to be executed in their respective corporate names, by their respective presidents, attested by their respective secretaries, and their respective corporate seals to be hereto attached and all the other pastics to this agreement have executed the same under their hands and seals the day and year first above written.

> CORNISH, CURTIS & GREENE COMPANY, By GEO. A. PRATT, President. (SEAL)

Attest: ..... Sec

CREAMERY PACKAGE MANUFACTURING COMPANY.

By C. M. GATES, President. (SEAL)

Attest: W. W. JOHNSON, Sec.

# EXHIBIT A (2).

Whereas, The Creamery Package Manufacturing Company, a corporation, organized and existing under and in accordance with the laws of the State of Illinois, proposes to increase its capital atock from Four Hundred Thousand Dollars, \$400,000.00 to Two Million Dollars, \$400,000.00 to Two Million Dollars, \$400,000.00 and to purchase the property and assets of the following named firms and corporations, viz: F.B. Fargo & Company, of Lake Mills, Wisconsin, F.B. Fargo & Co. of St. Paul, Minnesots; Cornish; Curtis & Greene Manufacturing Com-

pany of Fort Atkinson, Wiscomin, and Cornish, Curtis & Greene Company of St. Paul, Minnesota, and a portion of the property and assets of A. H. Barber & Company of Chicago, Illinois, all of said companies being corporations, and the property of C. E. Hill and F. L. Macnish consisting of a co-partnership under the firm name of C. E. Hill & Company, of Kansas, Crist Missouri; and

Whereas, It is desired to continue in the service and employment of the Creamery Package Manufacturing Company, after its capital stock shall be so increased, and said properties shall be so purchased, J. H. Cornish, who is now connected and has extain contracts with the Cornish, Curtis & Greene Company;

Now, Therefore, In consideration of the premises, it is hereby agreed by and between said Creamery Package Manufacturing Company, party of the first part, and said J. H. Cornish, party of the second part, as follows:

Said party of the second part shall continue in all respects to work under his aforesaid contracts with the Cornish, Curtis & Greene Manufacturing Company and Cornish, Curtis & Greene Company, which said contracts are hereby assumed by the Creamery Package Manufacturing Company, until the thirtieth day of June, 1808; and thereafter he shall continue in the employ of and be employed by the said Creamery Package Manufacturing Company at a salary of thirty-six hundred dollars—\$3,500.00—per annum, payable monthly, until and including December 31st, 1900.

And it is Further Agreed, That said second party shall assire, and he does hereby assign, but for the life of this contract only, all profits, but reserving all other rights and benefits which may accrue to him under and by virtue of a certain contract with said Cornish, Curtis & Greene Mig. Co., and said Cornish, Curtis & Greene Co., and John Boyd with reference to the sales agency for the Boyd vat, and in consideration thereof the said Creamery Package Manufacturing Company agrees to pay further to said J. H. Cornish a commission of five (5) per cent on the list price of all of said vats which he may sell for said Creamery Package Manufacturing Company after July 1st, 1898, during the life of this contract; and it is further agreed that in any clauses in said contracts between said second party and said Cornish, Curtis & Greene Co. and Boyd, wherein reference is made to cost and shop profits, said shop profits shall be considered as ten per cent (10 per cent) of the actual cost of manufacture.

It is Further Mutually Agreed by and between the parties hereto in consideration of the premises, that the party of the second part shall execute to said Creamery Package Manufacturing Compeny, party of the first part, such bond or bonds in some acceptable Guaranty or Surety Company for the faithful performance of his duties, as the Board of Directors of the said Creamery Package Manufacturing Company may require, the expense of securing such bond or bonds to be borne by said Greamery Package Manufacturing Company; and said party of the second part, in consideration of said salary and other compensations, so agreed to be paid, breby agrees to devote his time and attention, as well as his business endeavors to promote the interests and advance the business of said Creamery Package Manufacturing Company; and it is further agreed that said account party shall not be required, against his will, by said Creamery Package Manufacturing Company to do business for or to labor for said corporation in any other place or teritory than he has heretofore done business for or labored for said Cornish, Curtis & Greene Manufacturing Co.

It is Further Mutually Agreed by and between the parties to this contract that any patents taken out or acquired on any of the machinery or goods manufactured or handled by said Greamery Package Manufacturing Company, by by said second party, while in the employment of said Creamery Package Manufacturing Company, shall without any other or additional compensation be assigned by said second party to said Creamery Package Manufacturing Company. The resolution of the said Creamery Package Manufacturing Company, shall, at the option of the said Creamery Package Manufacturing Company, shall, at the option of the said Creamery Package Manufacturing Company be patented and assigned to said Creamery Package Manufacturing Company; all expenses of which shall be borne by the said Creamery Package Manufacturing Company. This provision of this paragraph is not to be applied to the Boyd vat

It is Agreed that the commission hereinbefore agreed to be paid upon sales of the Boyd vat shall be payable quarterly on the first day of October, January, April, and July in each year.

This agreement to be binding only upon the approval of all of the parties named in the first paragraph hereof.

In witness whereof, the said Creamery Package Manufacturing Company, party of the first part, has caused this agreement to be signed by its president and attested by its secretary, and its corporate seal affixed, and said second party has hereto affixed his hand and seal, this second day of March, 1898.

Signed:

# HERDANDES PACKAGE MANUFACTURING COMPARY

II NOW DESCRIPTION

I H CORNISH (SEAL).

AREH WW SHERWIN SCHOOL

The foregoing is satisfactory to us, providing the pooling avrangement is discontinued after Mar. 1, 1808.

F. B. FARGO & CO., Lake Mills. by E. J. FARGO, President. P. B. FARGO & CO., St. Paul, By E. J. PARCO. President. A H BARBER & CO. Per A. H. BARBER President. C. E. HILL & CO.. By F. I. MACNISH, Partner. CORNISH, CURTIS & GREENE CO., By S. S. SWASEY, Treasurer. CORNISH, CURTIS & GREENE MFG. CO. By H. H. CURTIS, President.

#### EXHIBIT A (3).

Whereas, The Creamery Package Manufacturing Company, a corporation, organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business in the City of Chicago, in said state, has heretofore purchased from A. H. Barber & Co., a corporation organized and existing under the laws of the State of Illinois, and having its principal place of business at Chicago, Cook County, Illinois, all machinery, fixtures, patents, notes, contracts, book accounts, good will and all other property of every kind and description included and belonging to the creamery supply and refrigerating machinery business or department of the said A. H. Barber & Co., under and according to the terms and provisions of a certain contract entered into Feb. aath. 1808, by and between the said Creamery Package Mig. Co., and the said A. H. Barber & Co., and others; and

Whereas, It is agreed in and by said contract, dated Feb. 24th, 1808, among other things that upon the purchase of the atoresaid described property of said A. H. Barber & Co., by the said Creamery Package Mig. Co., that the business of the said Creamery Pricinge Mig. Co., to purchased as aloresaid from the said A. H. Barber, & Co., should be managed and conducted at 225 and 231 South Water Street, in the City of Chicago, Cook County, Illa., as

a branch establishment of the said Creamery Package Mfg. Co. by A. H. Barber and W. S. Goodbue as agents of the said Creamery Package Mfg. Co., and whereas, the contract has heretofore been executed by and between the said Creamery Package Mfg. Co., and the said A. H. Barber & W. S. Goodbue, whereby said parties last named agree to work for said Creamery Package Mfg. Co. at a safety therein named for a time therein named.

Now. Therefore, it is hereby mutually agreed by and between the said Creamery Package Mig. Co., as parties of the first part, and the said A. H. Barber and W. S. Goodhue, as party of the second part, as follows:

There shall be, and there is hereby established at Nos. 225 to 231 South Water Street, Chicago, Illinois, a branch of the said Creamery Package Mig. Co. to carry on and conduct the business of the said corporation at the place aforesaid under the firm name of the A. H. Barber Mig. C., said business to be conducted by A. H. Barber & W. S. Goodhue, under the firm name aforesaid, but as agents of the said Creamery Package Mig. Co.

Of the two persons above named the said A. H. Barber shall be, and is hereby selected manager of the said branch of the Creamery Package Mfg. Co. at 225 to 231 South Water Street, Chicago, Illa.

The said A. H. Barber and W. S. Goodhue so associated together as aforesaid shall have authority, subject, however, to the control of the President or of the Board of Directors of the said Creamery Package Mfg. Co. to hire and discharge men, and to huy, sell, manufacture, and deal in any of the goods, wares and merchandise bought, sold, manufactured and dealt in by the said Creamery Package Mfg. Co., but as agents of the said Creamery Package Mfg. Co., though such business is done under the firm name of A. H. Barber Mfg. Co.

In case of any dispute or controversy between the two persons above named, the said A. H. Rarber as such manager, shall decide, and his decision as between said two persons shall be final.

It is further agreed that said A. H. Barber and W. S. Goodhuc, as such agents of the Creamery Package Mfg. Co shall keep, or cause to be kept, accurate books of account of all the business tone or carried on by them, under and according to the terms of this contract and shall make in writing and send to the general offices of the said Creamery Package Mfg. Co. at Chicago, Illa, trial balances of their said books every month, or such other report as may be required by the Board of Directors, or by the Executive

Committee of the said Cresmery Package Mfg. Co. Such hooles of account shall be, and are hereby declared to be the property of the said Creamery Package Mfg. Co. and shall at all times be open to the inspection or examination of said Creamery Package Mfg. Co. through any of its designated representatives:

It is further mutually agreed by and between the parties hereto that the said Creamery Package Mig. Co. shall have and doe, hereby assume the contract of employment between said A. H. Barber & Company and S. D. Flood, or between A. H. Barber and W. S. Goodhue, and raid Flood and agrees to carry out the terms thereof, and the said Creamery Package Mig. Co., hereby guarantees to the said A. H. Barber and W. S. Goodhue against any and all loss or liability arising out of the proper conduct or management of the business of the said Creamery Package Mig. Co., by them as such agents, and said A. H. Barber and W. S. Goodhue hereby agree that they will execute to the said Creamery Package Mig. Co. such indemnifying bond or bonds in some acceptable guaranty or surety company for the faithful performance of their duties as such agents of the said Creamery Package Mig. Co. through its Board of Directors may require, the expense of securing such indemnifying bond or bonds be borne by the said Creamery Package Mig. Co.

It is further mutually agreed by and between the parties hereto that the said Creamery Package Mfg. Co. shall furnish the capital and means wherewith to properly manage and conduct its said
business at said branch at 225 and 231 South Water Street, Chicago,
Ilis., and shall at no time during the existence of this contract, without the concurrent consent of the said A. H. Barber and W. H.
Goodhue, so change the location of said branch as to require the
said A. H. Barber or W. S. Goodhue that either of them should, in
order to enjoy their salary provided for in this contract work at any
other place than said 225 and 231 South Water Street, Chicago, Ills.

The said Creamery Package Manufacturing Co. shall immediately secure an indemnity policy at its expense, which shall protect itself and the said A. H. Barber and W. S. Goodhue from any and all liabilities arising out of injuries to persons or property happening in the conduct of said business by said agents under this contract, it not being the intent of this portion of this agreement that said A. H. Barber or W. S. Goodhue shall be protected against injury to themselves resulting from their own abgligence.

It is further mutually understood and agreed that the said A. He Barber and W. S. Goodhue shall not be obliged against their will by said Creamery Package Mig. Co. to do business for or to labor for said corporation at any other place or territory than said per-

sons have heretofore done business for or labored for the said corporation heretofore known and existing as A. H. Barber & Co.

It is further minimally understood and agreed by and between the parties hereto that the said A. H. Barber shall receive for his services as such agent the sum of Thirty-six Hundred dollars (\$3,-00000) per ennum payable in monthly payments of Three Hundred Dollars each, and the said W. S. Goodhue is to receive for his services the sum of Eighteen Hundred Dollars (\$1,800.00) per annum, payable in monthly installments of \$150 each, both said salaries to commence as of the 1st day of March, 1808, and to be paid at the end of each month.

And the said A. H. Barber and W. S. Goodhue tach hereby agree that they will not draw for their personal use from the funds of said corporation in their possession or control to exceed the amount of their salaries as above specified.

In consideration of the foregoing, the said A. H. Barber hereby agrees to devote his entire time and attention, and the said W. S. Goodhue to devote not less than half his time and attention, (it being understood that the said W. S. Goodhue has other business to which he desires to devote the balance of his time) as well as their business endeavors to promoting the interests and advancing the business of the said Creamery Package Mfg. Co. and further agrees to abide by and fully execute in all respects the terms and provisions of said salary contract heretolore executed by and between the said Creamery Package Mfg. Co. and the said A. H. Barber and W. S. Goodhue and others, so far as they are individually concerned.

This contract shall be in force and effect from the 1st day of March, 1898, up to and including the 31st day of December, 1900.

In witness whereof, the said Creamery Package Mfg. Co. has caused these presents to be executed in its corporate name by its President, attested by its Secretary and its corporate seal to be hereto attached, and the said A. H. Barber and W. S. Goodhne have signed and sealed the same this twentieth day of May, 1808.

CREAMERY PACKAGE MFG. CO., By C. M. Gates, Its President.

A. H. BARBER, W. S. GOODHUE, (SEAL)

25 10 17 17 10 10 1

1 1 1 1 2 2 X 1 2 3

Attest: GEO. WALKER, Its Secretary.

(CORPORATE SEAL)

Articles of Agreement made and entered into this 19th day of Apeil, 1897, by and between the Dwatonna Manufacturing Company, a Corporation, duly incorporated under the laws of the State of Minnesota, and having its principal place of business at Owastonna, Minn., party of the first part, and the Creamery Pkg. Mnfg. Co., a corporation, duly incorporated under the laws of the State of Illinois, with its principal place of business at Chicago, Ill., party of the second part.

Witnesseth: That Whereas, the party of the first part is the owner of certain patents, covering Combined Churns and Butterworkers, and is now manufacturing Combined Churns and Butterworkers, and is intending to manufacture other Combined Churns and Butterworkers under said patents, and said party of the second part is desirous to handle the said Combined Churns and Butterworkers as sole Sale Agents. The parties hereto have entered into the following agreement, which shall be mutually binding upon each of them.

The said party of the first part hereby agrees for the consideration hereinafter named that the said party of the second part shall have the entire control of the sales throughout the United States and territories thereof, Canada and all foreign lands, for all sizes and kinds of Combined Churns and Butterworkers, and repairs for same, manufactured by the party of the first part, its licenses, successors and assigns during the continuance of this contract, and said party of the second part shall pay said party of the first part for each Combined Churn and Butter Worker so manufactured; also all repair parts for the same, a sum equal to 50 per cent of the list prices thereof. Terms of payment ninety days from date of shipment, with the privilege of 3 per cent off for cash within 15 days. On all car loads of machines, the ninety (90) days shall begin to run on each churn as sold by the party of the second part; reports of such sales shall be promptly made by said party of the second part and the same discount shall be allowed. The present list prices and dimensions of said churns agreed upon, are as follows:

Name-	No.	Dia. Drum.	Length Staves.	List Price.
Winner		49 in.	42 in.	\$135.00
Winner	高起, 医异种类性 医克里特氏 医克里特氏	49 in	48 in.	140.00
Winner :.		49 in.	64 in.	155.00
Winner	7	49 in.	79 in.	170.00
Winner	THE RESERVE OF THE PARTY OF THE	49 in.	94 in.	190.00

Winner	10	49 in.	to8 in.	225.00
Disbrow	3	49 in.	48 in.	140.00
Disbrow		49 in.	64 in.	155.00
Dishrow	CONTROL OF THE WAR AND THE TOP	49 in.	79 in.	170.00
Disbrow		49 in.	94 in.	190.00
Distrow	7	49 in.	108 in.	\$25.00

Prices of smaller sizes to be agreed upon.

List prices named herein are based on present sizes of Churn Drums and no change shall be made in above sizes or prices except by mutual agreement, but other additional sizes may be made and the list price thereof shall be in proportion to size.

This contract shall continue during the life of the patents on Combined Churns and Butterworkers now owned and controlled by the party of the first part, and those which it may hereafter acquire. The patent office number of the patents, now owned and controlled by said party of the first part are as follows:

No. 490,105 dated January 17, 1893, issued to Reuben B. Disbrow and Darius W. Payne.

No. 527,673, dated October 16th, 1894, issued to Reuben B. Disbrow.

No. 527,716, dated October 16, 1894, issued to Darius W. Payne. No. 564,977, dated August 4, 1896, issued to Reuben B. Disbrow. No. 564,978, dated August 4, 1896, issued to Levi A. Disbrow.

Also applications filed by Reuben E. Disbrow July 11, 1896, No. 508.836 and allowed November 25, 1896, now pending in the United States Patent Office.

All existing contracts for the sale of Combined Churus and Butterworkers now held by the party of the first part are to be assigned to the party of the second part and such contracts to be fulfilled by it, unless modified by subsequent contracts with the consent of the contracting parties.

Rebates on all Churns sold and delivered under such contracts up to this date, shall be paid by the party of the first part.

The party of the second part is to have control of all advertising and circular work, but the expense of same shall be borne equally by the parties hereto. Amounts to be expended therefor to be determined by mutual consent. The party of the first part agrees to furnish the circulars and Churn catalogues at its own expense, and the party of the second part agrees to mail and distribute the same at its own expense.

The party of the first part agrees to furnish electrotypes and outs at its own expense. All such advertising printed matter, cir-

culars and catalogues to be supplied as called for by the party of the second part and to have thereon the name of the party of the second part and its several branches as sole general agents unlead otherwise directed by said party of the second part.

All inquiries and correspondence received by the party of the first part on Churn business to be turned over and referred to the

party of the second part.

The discount of 50 per cent on the repair parts to be made on established lists, the list of repair parts for the Winner Churn and such other kinds and styles of churns as shall be made hereafter to be made to correspond in price to similar parts as set forth in the present list of repair parts of the Disbrow Churns.

The party of the first part hereby agrees to guarantee the quality of all machines so manufactured by it, as to material, workmanship, and operation to do the work required, except that it does not guarantee the principle for working butter as embodied in the present form of the Winner Churn.

No changes in the kind or quality of material used nor any radical change in style and construction of machines shall be made without consultation with, and permission from, the party of the second part. The party of the first part also further agrees to embody in the manufacture of said Churns suggestions from the party of the second part from time to time as shall seem mutually desirable.

The party of the first part further agrees to protect the party of the second part from all suits for infringement of patents: or claims for damages arising out of the sales of said churns and not the fault of the party of the second part also to defend at its own expense the validity of the patents; promptly and vigorously attack infringers of any and all of said patents concerning Combined Churns and Butterworkers and to procure patents on all improvements made by it or by any person in its behalf.

The party of the first part further agrees to make all the styles, sizes and kinds of Churns and Butterworkers demanded by the trade, under any and all of said patents, and further agrees to keep on hand a sufficient stock of all sizes and kinds of Churns and Butterworkers and to make prompt shipments on receipt of orders from the party of the second part, or its authorized agents.

Party of the second part agrees to make and furnish estimates of probable need from time to time and of as early a date as it shall be advised thereof.

Said party of the first part further agrees to deliver all goods

F. O. B. cars at Owatonna in good condition, properly crated to conform to the requirements of railroads and transportation companies under which the lowest rates of freight will be secured and all goods in car loads to be properly crated in same manner for reshipment, and further agree to steneil all said Churns and Butterworkers as follows:

"Manufactured for the Creamery Package Mfg. Co., Chicago, Ill. Mankato, Minn., Kansas City, Mo., sole general agents," or such other description as the party of the second part may designate.

It is further mutually agreed that all expenses incurred in adjusting complaints from users as to imperfections of machines shall be borne equally by both parties hereto

In case it shall become necessary to take back any machine on account of alleged imperfections or efficiencies, such machines shall be taken by party of the second part and the party of the first part shall rebate to party of the second part part one-half the parts at which such machines were originally billed.

Party of the first part agrees to furnish free of charge any repair parts needed to repair such churns, so returned, to put such Churns in good repair again. The above provisions to not apply to cases where the machine is clearly defective in mechanical construction, in which case the party of the first part shall take such machine back at the price at which it was originally billed.

Such machines after being repaired shall be offered to the party of the second part at a reduced price and if such offer is not accepted the party of the first part shall have the privilege of selling such machines to other parties.

In case of disagreement in carrying out the provisions of this contract, either party may give a written notice to the other party relative to such disagreement; and unless such disagreement shall be otherwise amicably adjusted within thirty days, the said disagreement shall be submitted to a Board of Arbitrators consisting of three disinterested persons; said coars of arbitrators to be chosen. one by each of the parties hereto and the third by the two so chosen, both parties shall be fully heard and the decision force said board of arbitrators shall be final and bind and parties hereto but shall not result in the discolu-Should the two arbitrators chosen by the to inil to agree upon the third arbitrator, then the nay agree upon the third arbitrator. Said arbitration Se their report in writing within thirty (30) . as a bray be made by a majority of such arhierators fail to make a decision, then another board of arbitrators shall be chosen in the

same manner. It is further mutually agreed by and between the parties hereto, that the party of the second part shall retain from the purchase price of each Churn and Butterworker received by it the amounts of royalties agreed to be paid to the Diabron M.fg. Co. which said royalties are as follows:

Pr

resent	Number	r. Present							alty.
				 	 	 	 	 	1.50
		Winner							
		Winner							5.50
		Disbrow							5.50
		Winner	 	 	 	 	 	 	6.00
		Disbrow	 	 	 	 	 	 	6.00
	5	Winner	 	 	 	 	 	 	7.00
320	es Alego trans	Disbrow	 	 	 	 	 	 	8.00
		Winner	 	 	 	 	 	 	8.00
	5	Disbrow	 	 	 	 		 	9.50
	3	Winner.	 	 	 	 	 		9.50
	0	Winner	 	 	 	 	 	 	10.00
1		Winner	 	 	 	 	 		11.00
	7	Diabrow							00.11

And shall pay said royalties over to said Disbrow Mfg. Co., in such manner as shall be agreed upon between the said party of the second part herein and said Disbrow Mfg. Co., or as provided in contract of even date between the party of the first part herein and said Disbrow Mfg. Co., and certain of its members.

Wherever the word "Churn" or "Machine" occurs in the foregoing contract they shall be held to mean Combined Churn and Butterworker.

It is further mutually agreed by and between the parties hereto that the foregoing contract shall apply to and be binding upon said parties, their successors, assigns and legal representatives.

In testimony whereof both parties hereto, have subscribed their names and affixed their seals on the day and year first above written.

"OWATONNA MANUFACTURING COMPANY, (SEAL)
By "D. J. AMES", President.
"T. J. HOWE, Secretary.

"CREAMERY PACKAGE MFG. COMPANY, (SEAL)
By "CHARLES M. GATES", President.

"W. W. SHERWIN," Secretary.

Signed, scaled and delivered in presence of "RALPH W. PATRICK."
"GEO. WALKER".
(SEAL)

STATE OF MINNESOTA.

County of Blue Earth,

In this twentieth day of April A. D. 1897, before me, a notary public within and for said county, personally came D. J. Ames and T. J. Howe, who being duly sworn, did say, that they are the President and Secretary, respectively of Owatonna Mig. Co., a corporation duly organized and incorporated under the laws of the State of Minnesota; that said corporation has no seal and that the foregoing instrument was signed and sealed by them in behalf of said corporation by authority of its board of directors and said D. J. Ames and T. J. Howe each acknowledged said instrument to be the free act and deed of said corporation.

WALTER McBROOM."
Notary Public Blue Earth County, Minn.

(NOTARTAL SEAL)

STATE OF ILLINOIS, County of Cook.

55.

On this 23rd day of April, 1897, before me a notary public within and for said county, personally came Charles M. Gates and W. W. Sherwin who being duly sworn did say that they are the Presldent and Secretary respectively of the Creamery Pkg. Co., a corporation duly organized and incorporated and existing under the laws of the State of Illinois. That the seal attached hereto and impressed hereon is the Seal of said Corporation. And that the foregoing instrument was signed and sealed by them in behalf of said corporation, by authority of its Board of Directors and said Charles M. Gates and W. W. Sherwin, each acknowledge said instrument to be the free act and deed of said corporation.

> "RALPH W. PATRICK," Notary Public, Cook County, Ill.

(SEAL)

# EXHIBIT B (2).

Owatonna, Minn., June 24th, 1897.

Addends to contract and agreement made and entered into on the 19th day of April, 1807, by and lettagen the Owet man Mig. Co. of Owatonna, Minn., and the Creamery Package Mig. Co. of Chicago, Ill.

It is mutually agreed by and between the parties hereto that the contract herein mentioned shall be modified as follows:

charge all extra or repair parts for the Winner churns as the Creamery Pkg. Mfg. Co., may be obliged to take back from customers. They also agree to rebate fifty per cent of the billing price of all such churns so taken back less one-half of the royalty paid on said machines, and such churns shall then be the property of the Creamery Pkg. Mfg. Co. They further agree to make all the improvements in the mechanical construction of the Winner churn as is possible and as fast as practicable, the same to be done at their own expense. And they also agree to make good any defect in material and workmanship in any and all of the Winner churns made and supplied by them.

and It is hereby agreed by the Creamery Pkg. Mfg. Co. that they shall pay all expenses of fixing up and making good Complaints of the Winner churns except as above noted, including traveling expenses and freights; and they shall use their utmost endeavors to prevent the return of any Winner churn. Witness our hands this day and date first above written.

OWATONNA MFG. CO.,
By D. J. AMES, President.
CREAMERY PACKAGE MFG. CO.,
Per C. M. GATES, President.

Witnesses:

A. M. SHELDON, LEWIS L. WHEELOCK. (Acknowledged by both parties)

# EXHIBIT B (3).

# SUPPLEMENTAL CONTRACT.

This Agreement made and entered into this 12th day of January, A. D. 1809, by and between the Owatonna Manufacturing Company, of Owatonna, Minnesota, party of the first part, and the

Creamery Package Manufacturing Company, of Chicago, Illinois, party of the second part, Witnesseth:

That Whereas, a certain contract was made on the 19th day of April, A. D. 1897, by and between the parties hereto, and the parties hereto are desirous of supplementing and adding to said contract and for that purpose do hereby make and enter into a supplemental contract as hereinafter set forth.

Whereas, the parties hereto did, on the 30th day of September, A. D. 1807, enter into a license contract with Cornish, Curtis & Greene Manufacturing Company, of Fort Atkinson, Wisconsin, whereby said Cornish, Curtiss & Green Manufacturing Company agrees to pay certain royalties to the parties hereto on account of the manufacture of certain churns under the Disbrow patents.

Now, Therefore, for the consideration expressed in the original contract, it is hereby agreed by and between the parties hereto that any moneys received from Cosnish, Curtis & Greene Manufacturing Company, as royalties on account of said license contract, shall be disposed of as follows, to-wit: There shall first be paid from said money all royalties due the Disbrow Manufacturing Company, its successors or assigns, on account of the churns so manufactured by Cornish, Curtis & Green Manufacturing Company and the balance of said money shall be equally divided between the Owatonna Manufacturing Company and the Creamery ackage Manufacturing Company, the parties hereto.

It is hereby understood and agreed that this supplemental agreement shall apply to any and all license contracts which may be made by the consent of both parties hereto during the life of the original contract.

In Testimony Whereof, both parties have hereunto signed their names and affixed their seals this day and year first above written.

OWATONNA	MANUFA	CTURING	COMPANY,	(SEAL)
				SAN TO POST TANDERS OF THE PARTY OF THE PART

By D. J. AMES, President. (SEAL)

and T. J. Howe, Secy. and Treas. (SEAL)

In presence of,

LEWIS L. WHEELOCK, MINNIE E. AMES.

# (CREAMERY PACKAGE MFG. CO.'S SEAL)

By C. M. GATES, President (SEAL)

and W. W. SHERWIN, Secretary. (SEAL)

GEO. WALKER, D. H. ROE.

as to-

(CREAMRY PACKAGE MFG. CO.'S SEAD)
(Acknowledged).

## EXHIBIT B (4).

This agreement, made this fourth day of June, 1898, by and between the Owatonna Manufacturing Company, a corporation organized and existing under the laws of the State of Minnesota, and having its principal place of business in the City of Owatonna, in said State, party of the first part, and the Creamery Package Manufacturing Company, a corporation, organized and existing under the laws of the State of Illinois and having its principal place of business in the City of Chicago, in said State, party of the second part, Witnesseth:

That Whereas, on the nineteenth day of April, 1897, an agreement was made and entered into between said parties of the first and second-part whereby said party of the second part was given the exclusive sales agency of the combined churns and butterworkers manufactured by the above named parties of the first part, under certain letters patent and upon certain terms and conditions specified in said agreement, which is hereinafter referred to as the "sales contract"; and

Whereas, certain litigation has been pending in the United States Circuit Courts, for the District of Minnesota, between the above named party of the first part and the F. B. Fargo & Company, of Lake Mills, Wisconsin, and certain customers of said F. B. Fargo & Company concerning certain of the patents named in said sales contract; and

Whereas, the said F. B. Fargo & Co., has been engaged in the manufacture and sale of a combined churn and butterworker of the kind and style known and designated as the "Victor" combined churn and butterworker, which it is agreed between the parties is not an infringement of any of the patents recited in said sales contract; and

Whereas, said party of the second part has acquired the business of said F. D. Fergo & Company of manufacturing and selling churns and butterworkers, and proposes to continue the same and to manufacture and sell such other combined churns and butterworkers as have been or may be hereinafter developed and which do not infringe upon the patents recited in said sales contract; and

Whereas, it is claimed by the party of the second part that ma-

chineses substant and sold by said party of the first part of the character specified and designated in said sales contract, constitute an infringement of certain letters patent owned by said party of the second part, and,

Whereas, the parties hereto are desirous of settling all claims for profits, damages or costs that have accrued to said party of the first part through the manufacture, sale and use of any infringing combined churns and butter-workers made by said F. B. Fargo & Company, and through the litigation above referred to, and also of settling and adjusting any claims that may have accrued to said party of the second part through the infringement or alleged infringement of any patent owned or controlled by said F. B. Fargo & Company, or said party of the second part, in the manufacture and sale of any combined churn and butterworker heretofore made or sold by said party of the first part; and are also desirous of making a general adjustment between the parties hereto of differences that have arisen by reason of said sales contract and the acquiring by said party of the second part of the churn and butterworkers business of said F. B. Fargo & Company.

Now, Therefore, in consideration of the premises and of the covenants and the agreements hereinafter contained, to be performed by each party, said parties have agreed as follows:

First: That equity sult No. 704 now pending in the Circuit Court of the United States for the District of Minnesota, Third Division, in which the proofs have been taken and the testimony printed, shall be brought to a speedy hearing and determination upon the proofs and exhibits in the case; that all other pending suits involving patents owned or controlled by either of the parties hereto, shall be dismissed, the costs of each party in every suit being paid by such party; and that no suits shall be brought hereafter by either party hereto against the other, or its customers, or by the party of the first part against said F. B. Fargo & Company, or its customers, on account of the manufacture and sale of any combined churn and butterworker prior to the date of this agreement.

Second: The party of the second part covenants and agrees that it will not manufacture the machine referred to in the said sales contract and generally known as the "Winner", or the machine referred to in the sales contract as the "Disbrow" or any combined churn and butterworker which includes a revoluble churn drum with rotating butterworkers or rolls arranged therein and adapted to whirl with the drum during the churning operation, and

to remain in a fixed position within the chirri drum during the rotation of the drum in the butterworking operation, and that it will not sell any of the machines thus defined, other than those manufactured by the said party of the first part; it being, however, understood and agreed by and between the parties hereto that so far as the present rights of the party of the first part are concerned, said party of the second part is at liberty to manufacture and sell combined churns and butterworkers of any construction other than those thus hereinbefore expressly excepted.

Third: In full payment and satisfaction of all royalties, damages and costs accrued to aid party of the first part by reason of the manufacture and sale of churns and buttterworkers by said Creamery Package Manufacturing Company and F. B. Fargo & Company, or either of them, and of all damages by reason of the use of said machines, said party of the second part hereby agrees to pay to said party of the first part the sum of Seven Thousand (\$7,000.00) Dollars as follows:

Two Thousand (\$2,000,00) Dollars upon the execution of this agreement, and Five Thousand (\$5,000.00) Dollars in quarterly payments, each equal to five per cent (5 per cent) of the list price of the factory size combined churn and butterworker, other than those manufactured by the party of the first part, which have been sold during the quarter by the party of the second part, it being understood and agreed that the quarterly periods to be covered by such payments shall begin at the date of this agreement, that such payments shall cease and determine when they amount in the aggregate to the said sum of Five Thousand (\$5,000.00) Dollars; and that no part of said sum of Five Thousand (\$5,000.00) Dollars shall be paid, except as it accrues as a percentage of sales of combined churns and butterworkers not made by the party of the first part. And said party of the first part hereby agrees to accept said cash payment of two Thousand (\$2,000.00) Dollars as the above agreement for the payment of said additional sum of Five Thousand (\$5,000.00) Dollars as set forth, in full payment, settlement and satisfaction of all its claims by reason of the manufacture and sale of combined churns and butterworkers, prior to the date of this agreement, by said party of the second part and said F. B. Pargo & Company, and also in full pagment and satisfaction of any claim for damages by reason of the use of said machines and also of any claims by reason of the future sale by said party of the second part, or said F. B. Fargo & Company, of the fifty combined churns and butterworkers of the style known as the "Fargo A" Churns and Butterworkers, now on hand, which it is understood

and agreed that said party of the second part, or said F. B. Fargo & Company, may sell hereafter.

Fourth: It is understood and agreed that the said sales contract shall be and remain in full force and effect between said parties of the first and second parts and that the following provisions are added thereto.

It is agreed that the said party of the first part is entitled to manufacture and furnish fifty-five (55) per cent in value at list prices of the factory-sized combined churns and butterworkers sold by said party of the second part, in each year from and after the date of this contract and that if in any year after the date of this contract less than fifty-five (55 per cent) per cent in value at list prices of factory size combined churns and butterworkers sold by the party of the second part are made and furnished by the party of the first part then said party of the second part agrees to pay to the party of the first part, until said sum of Five Thousand (\$5,000.00) Dollars hereinbefore referred to has been fully paid, a further sum of three (3 per cent) on the excess in value above forty-five (45 per cent) of said machines of other makes sold by it; and said party of the second part further agrees that after said sum of Five Thousand (\$5,000.00) Dollars has been fully paid, it will pay to the party of the first part eight (8 per cent) per cent on the excess in value above forty-five (45 per cent) per cent of said machines of other makes sold by it in each year.

Said party of the second part further agrees that in the sale of combined churns and butterworkers it will not discriminate against the machines manufactured by said party of the first part, and in favor of those of its own manufacture or of other manufacture and that it will give to the sale of the machines made by the party of the first part the same effort and energy as to the sale of the machines which it may itself manufacture or may buy from other manufacturers.

Fifth: Said party of the first part hereby agrees to protect all patents upon sombined churns and butterworkers that it now owns or those that it may hereafter acquire, by prosecuting infringers thereof at its own expense; and said party of the second part hereby agrees that it will give to said party of the first part any possible assistance in the prosecution of such infringers, provided, all expense thereof shall be borne by said party of the first part; and it further agrees that it will not lend its assistance to infringers in defending against the patents owned by said party of the first part.

Sixth: Said party of the second part further agrees that during the continuance of this contract, said party of the first part may continue to manufacture its present "Disbrow" and "Winner" machines and shall be held harmless in such manufacture, as against any patents now owned or hereafter acquired by said party of the second part.

Seventh: Said party of the second part further agrees that as a basis for the payment of the percentages upon sales of machines, other than those made by the party of the first part, as hereinbefore stipulated, it will make and deliver to said party of the first part written statements as follows:

Until said sum of Five Thousand (\$5,000.00) Dollars referred to in clause three of this agreement is fully paid, it will make quarterly statements, each of which shall show the factory numbers sizes and list prices of all the factory size combined churns and butterworkers sold by it during the quarter covered by it thereby; and after said sum of Five Thousand (\$5,000.00) Dollars shall have been fully paid, it will make annual statements, each of which shall show the factory numbers, sizes and list prices of all factory—size combined churns and butterworkers sold by it during the year covered by it thereby.

In Witness Whereof, each of the parties hereto has caused this agreement in duplicate to be signed by its president and attested by its secretary; and said party of the second part has caused its corporate seal to be hereto affixed, the party of the first part having no corporate seal.

OWATONNA MANUFACTURING COMPANY,,
By "D. J. AMES," President.

Witnesses:

"A. C. PAUL,"

"LEWIS L. WHEELOCK."

Attest:

"T. J. HOWE," Secretary.

CREAMERY PACKAGE MANUFACTURING COMPANY,
By "C. M. GATES", President.

Attest:

"GEO. WALKER," Secretary.

(SEAL)

# STATE OF MINNESOTA,

County of Hennepin. as

On the fourth day of June, 1808, before me appeared D. J. Ames, to me personally known, who, being first duly sworn, did-say that he is the president of the Owatonna Manufacturing Company, that said company has no corporate seal, and that the foregoing instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and said D. J. Ames acknowledged said instrument to be the free act and deed of said corporation: also appeared C. M. Gates, to me personally known, who, being by me duly sworn, did say that he is the president of the Creamery Package Manufacturing Company and that the seal affixed to said instrument is the corporate seal of said corporation and that the said instrument was signed and sealed on behalf of said corporation by authority of its board of directors and said C. M. Gates acknowledged said instrument to be the free act and deed of said corporation.

> "A. C. PAUL." Notary Public Hennepin County, Minnesota.

Addendum to contract by and between Owatonna Manufacturing Company of Owatonna, Minnesota, and the Creamery Package Company of Chicago, Illinois, under date of June 4th, 1898.

It is hereby agreed and understood by and between the parties to the foregoing contract, executed at Minneapolis on the 4th 'day of June, 1808, that said contract shall terminate with the terminationof the "sales Contract" referred to herein.

Dated June 20th, 1808.

"OWATONNA MFG. CO." (SEAL) Per "F. LA BARE," President.

"CREAMERY PKG. MFG. CO." (SEAL) Per "C. M. GATES,"

(SEAL)

June 30, 1808, Rec'd of Cry. Pkg. Mfg. Co. June 4, contract \$1,000.00 June 30, 1898, Rec'd of Cry. Pkg. Mfg. Co. June 4, contract 1,000.00 Oct. 14, 1898, Rec'd of Cry. Pkg. Mfg. Co. June 4, check. Oct. 38, 1898, Rec'd of Gry. Pkg. Mig. Co. June 4 contract

Check	41.50
Dec. 9, 1898, Rec'd of Cry. Pkg Mfg. Co. June 4 contract	
Wizard Churn	82.25
Feb. 6, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
Victor-Wizard Barber	253.50
Mch, 3, 1899, Reed of Cry. Pkg. Mig. Co., June 4 contract	
Barber	4.00
Meh. 11, 1800, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
69 Victors	551.00
Mch. 11, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
Mch. 11, 1809, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	35-25
	24.00
3 Barbers	
13 Wizards	101.75
June 12, 1800, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	.01.73
3 Barbers	22.50
June 12, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
84 Victors	669.50
Sept. 20, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
52 Victors	
Sept. 20, 1809, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
8 Wizards	
Sept. 20, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
2 Barbers	490.25
Dec. 16, 1890, Rec'd of Cry. Pkg. Mig. Co. June 4 contract	
32 Victors	
Dec. 16, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
4 Wizards	
Dec. 16, 1899, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
Barber	281.00
Mch. 9, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
34 Victors	
Mch. 9, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
8 Wizards	332.00
June 22, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
15 Wizards	
June 22, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
103 Victors	820.00
Sept. 14, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
28 Victors	
Sept. 14, 1900, Rec'd of Cry. Pkg. Mfg. Co. June 4 contract	
3 Wizards	259.50
Dec an roon Rec'd of Cry Pley Mfg. Co. June 4 contract	

\$7,000.00

#### EXHIBIT B (c).

THIS AGREEMENT, made this fourth day of June A. D. 1898, by and between the Owatonna Manufacturing Company, a corporation organized under the laws of the State of Minnesota, and having its principal place of business in Owatonna, in said state, party of the first part, and the Creamery Package Manufacturing Company, a corporation organized under the laws of the State of Illinois, and having its principal office and place of business at Chicago, in said state, party of the second part, WIT-NESSETH:

THAT, WHEREAS, the parties hereto have this day executed an agreement in relation to the manufacture of Combined churns and butterworkers, in settlement of pending litigation and of differences arising in other ways out of said business, one feature of said agreement being a settlement of all claims of the party of the first part against F. B. Fargo & Company, of Lake Mills, Wis, by reason of the manufacture and sale of Combined churns and butterworkers infringing letters patent owned by said party of the first part; and

WHEREAS, the party of the second part has not only acquired the business of said F. B. Fargo & Company in the manufacture and sale of Combined Churns and Butterworkers, but has also acquired the similar business of A. H. Barber & Company, of Chicago, Ill., and the Cornish, Curtis & Greene Manufacturing Company of Ft. Atkinson, Wis.

NOW, THEREFORE, it is hereby agreed, as a supplement to said agreement, of even date herewith, that the settlement made and provided in said agreement shall cover any claim of the party of the first part, by reason of the manufacture, sale and use of combined churns and butterworkers heretofore made by A. H. Barber & Company, and shall also cover any claim of said party of the first part, by reason of the manufacture, sale and use of Combined churns and butterworkers made by said Cornish, Curtis & Greene Manufacturing Company, prior to the date of this agreement, with the exception of such soyalty as may have accrued under a certain royalty contract heretofore entered into between the parties hereto and said Cornish, Curtis & Greene Manufacturing Company.

And said party of the second part further agrees that it will secure the execution and delivery to itself, by F. B. Fargo & Company, of a proper assignment of letters patent of the United States No. 515,667, iasued to said F. B. Fargo, February 27th, 1804, for improvements in butterworkers, including all rights for action for infringement of said letters patent, that said assignment shall be of a date earlier than the date of this assignment; and that such letters patent shall, in every way come within the provisions of the agreement of even date herewith, above referred to, so far as the same relate to patents owned by said party of the second part.

It is further understood agreed by and between the parties hereto, that in case the party of the first part shall be compelled by
the Disbrow Manufacturing Company, to pay said Disbrow Manufacturing Company any sum as royalty upon the manufacture by
said party of the second part, of Combined churns and butterworkers, during the continuance of the agreement of even date
herewith, above referred to, then said party of the second part shall
reimburse the party of the first part for the royalty, so paid; it being
stipulated however, by said party of the first part, that it will pay
no such royalties unless actually compelled so to do, by said Disbrow Manufacturing Company.

IN WITNESS WHEREOF, each of the parties hereto has caused this agreement in duplicate to be signed by its president and attested by its secretary; and said party of the second part has caused its corporate seal to be hereto affixed, the party of the first part having no corporate seal.

Witnesses

A. C. PAUL, LEWIS L. WHEELOCK

> OWATONNA MANUFACTURNIG COMPANY, By D. J. AMES,

President.

Attest

T. J. HOWE, Secretary.

GREAMERY PACKAGE MANUFACTURING COMPANY, By C. M. GATES,

President.

Attest

GEO. WALKER, Secretary.

(Creamery Package Manufacturing Co's Seal)
(Acknowledged)

## EXHIBIT B (6).

ADDENDUM to contract by and between the Owatonna Manufacturing Company, of Owatonna, Minnesota, and the Creamery Package Manufacturing Company, of Chicago, Illinois, under the date of June 4th, 1898.

It is hereby understood by and between the parties of the fore-going contract, executed at Minneapolis on the 4th day of June, 1898, that said contract shall terminate with the termination of the "Sales Contract" referred to therein.

Dated Tune 20th, 1898.

(SEAL) (NO SEAL)

OWATONNA MFG. CO., Per F. LA BARE, Pres. (SEAL)

CREAMERY PKG, MFG. CO. Per C. M. GATES Pres.

(Creamery Package Manufacturing Co's Seal)

# EXHIBIT B (7).

THIS MEMORANDUM OF AGREEMENT, Made and entered into by and between the OWATONNA MANUFACTURING COMPANY, a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business at Owatonna, Minnesota, party of the first part, and CREAMERY PACKAGE MANUFACTURING COMPANY, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at Chicago, Illinois, party of the second part, WITNESSETH:

That, whereas, the party of the first part, is the sole and exclusive owner of letters patent of the United States Number 585,-100, granted to Howe, Ames and LaBare, June 22nd, 1897, and which the party of the first part alleges to be infringed by the manufacture, use and sale by the party of the second part of the so-called Farrington Ripener, and Potts Pasteurizer, provided with doors like unto that showed and claimed in the letters patent aforesaid; and whereas, the party of the second part is desirous of securing the right and license to manufacture, use and sell such doors and frames, as described and claimed in the aforesaid letters patent; on pasteurizers and cream ripeners, manufactured and sold by said party of the second part, in and throughout the United

NOW, THEREFORE, TO ALL WHOM IT MAY CON-ERN, BE IT KNOWN, THAT, for and in consideration of One Dollar and other good and valuable countercation, in hand paid, to the party of the first part by the party of the second part, the re-ceipt of all whereof is hereby confessed and acknowledged, said party of the first part has given and granted and does hereby give and grant, unto the party of the second part, its successors and ensigns, the right and license to freely and shinterruptedly con-tinue the manufacture, use and sale of said door and frame, on all pastsuriners and cream ripeners, made and sold by said party of the second part, all under the authority of and in accordance with, the patent aforesaid, and particularly claimed and set forth in claims, 9, 10 and 11, of the letters patent aforesaid for, to and in the United States, for and during, the full remaining term of the letters patent aforesaid, Number 385, too, and it is further mutually understood and agreed by the parties hereto that if at any time the several contracts, considered as a whole, now existing between the parties hereto, with relations to combined churns and butterworkers, are cancelled by mutual consent; or become the subject of litigation, having for its purpose the annulment of said con-tracts and the severing of the relations existing between the parties hereto, then in that case, the party of the first part, shall have the right to rescind and cancell the license herein granted, after six (6). months written notice to the party of the second part of the party of the first part's intention so to do; and it is further mumally understood and agreed, that the party of the second part, executes this document only as acceptor of the license and may at any time. renounce and annul the license herein granted, and thereafter stand as though never a license

IN TESTIMONY WHEREOF, the party of the first part and the party of the second part have caused these presents to be executed by their respective officers, duly empowered, and their respective attests to be hereunto affixed, as of the first day of January, 1903.

Attest:

T. J. HOWE, Secretary.

OWATONNA MFG. CO., By FRANK LA BARE, President.

Owatonna Manufacturing Company has no corporate seal.

Attent:

F. J. MACNISH, Aust. Secretary.

CREAMERY PKG. MFG. COMPANY, By C. H. HIGGS, Vice Pres. THIS AGREEMENT, made and entered into this first day of January, A. D. 1903, by and between the OWATONNA MANU-PACTURING COMPANY, a corporation organized and existing under the laws of the State of Minnesetz, with its principal place of business at Outstonna, Minnesetz, party of the first part, and the GREAMERY PACKAGE MANUFACTURING COMPANY, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at Chicago, Illinois,

party of the second part.

WITNESSETH: THAT, WHEREAS, that there are now exlating certain contracts between said parties hereto, relative to the
COMBINED CHURNS and BUTTERWORKER business, and

WHEREAS, in the contract between the parties hereto, dated April 19, 1897, certain list prices and dimensions of said churns and butterworkers were agreed upon and stated therein, and it was further provided therein that list prices named therein were based on the present sizes of churn drums, and that no change should be made in the sizes and prices therein named except by mutual agreement, and

WHEREAS, the parties hereto have mutually agreed that changes shall be made in some of the list prices mentioned therein date

NOW, THEREFORE, it is mutually agreed from and after the date of this contract the list prices of the following described churns and butterworkers shall be as follows; instead of as stated in said contract dated April 19, 1897, that is to say:

## NEW LIST.

DISBROW COMBINED	DISBROW COMBINED
CHURNS	CHURNS
Dairy Sizes	Factory Sizes
Bs	No. 3 \$155.00
As 125.00	No. 4 175 00
A3 13500	No 5 195.00
	No. 6 220.00
	No. 7 260.00

It being further mutually agreed that the No. 7 machine shall always be hereafter equopped with new ring gear, and further, that either party hereto may change said new list prices by lowering the prices above stated, either by one time or by successive changes, provided, however, that they shall not be lowered at any time or by any successive changes below the list prices now stated in

said contract of April 19, 1857, and provided further that before any changes is said new list price shall become effective, the party desiring to make such change shall give the other party hereto, thirty (30) days written notice of its intention to change such list prices, together with the change sought and intended to be made.

And it being further mutually agreed that if at are time the price of No. 7 machine is restored to the price stated in the contract dated April 19, 1897, then in that case the party of the first part shall be relieved from the necessity of furnishing the aforesaid new ring gear with said No. 7 machine.

IN WITNESS WHEREOF, The parties hereto by their respective officers have hereunto set their hands and scale the day

and the year first above written.

# OWATONNA MFG. COMPANY, By FRANK LA BARE, President.

Attest:

T. J. HOWE, Secretary.

CREAMERY PKG. MFG. COMPANY,
By C. H. HIGGS, Vice President.

Attest:

F. J. McNISH, Asst. Secretary.

(SEAL)

# EXHIBIT B (9).

This agreement made this 19th day of April, 1897, by and between the Disbrow Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota and having its principal place of business at Mankato in said State, and Reuben B. Disbrow, Levi A. Disbrow, Darius W. Payne, and Horatio W. Seelye, all of Mankato, in the county of Blue Earth, and state of Minnesota, parties of the first part, and the Owatonna Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and having its principal place of business at Owatonna, in said state, party of the second part; WITNESSETH:

That, whereas, the above named Reuben B. Dishrow is the inventor of a certain combined churn and butter worker, for which letters pattent No. 490,105 of the United States were on the 17th day of January, A. D. 1893, issued to himself and the above named Durius W. Payne, as assignee of one-half interest therein; and

Whereas, other patents of the United States have been laused to certain of said parties of the first past, as follows, to wit:

No 507,575, dated Oct. 16th, 16th, to Reuben B. Dishri or; No. 557,716, dated Oct. 16th, 1894, to Darrius W. Payre; No. 564,977, dated Aug. 4th, 1896, to Reuben B. Dishrow; No. 564,978, dated Aug. 4th, 1896, to Levi A. Dishrow; and

Wherean, one or more of said first parties have made certain other hap overnests in the Combined churns and butterworkers, for which applications for letters patent of the United States have beretofore been made and are now pending in the United States Patent office; and

Milerone; on the and day of October, 1893, by an instrument is writing, said Reuben B. Disbrow and said Darius W. Payne who were then the owners of said letters patent No. 400,105, and of all rights thereunder, granted and assigned to said second party the exclusive right to manufacture and sell throughout the United States and the territories thereof, the Disbrow Combined Churn and Butterwooder, under said patent No. 400,105, and all subsequent passes for improvements that may be made to it for certain considerationages forth in said assignment, which said assignment of United States Patent Office in Liber R. 48, Page 373 of Transfers of Patents; and

Whereas, certain differences have arisen between said first and second parties, as to whether said second party is entitled under said assignment to the exclusive right to manufacture and sell Combined Churus and Butterworkers under said later patents and inventions on some, one or more of them, by virtue of said assignment, of October and, 1893, and as to whether said second party has fulfilled all of the terms of said assignment upon its part to be fulfilled; and,

Whereas, said first parties have engaged, and are now engaged, in the manufacture and sale of a combined churn and butterworker which they designate to the "Winner" or "The New Disbrow"; and,

Whereas, growing out of the above mentioned differences and the manufacture and sale of said Combined Churn and Butterworkor by said first parties, certain litigation has been instituted between mid parties; and,

Whents, had first and accound parties are desirous of settling all differences between them, stopping the pending heligation, and reaching in said second party the exclusive right to manufacture and the Calabined Churns and Butterworkers under any and all

pateurs that have been or may hereafter be granted to said parti-of the first part or any of them, jointly or reverally, How, therefore, said parties have agreed, and do hereby agre together, as follows:

- I. The parties of the first part agree to assign and have jointly and severally assigned by proper instrument in writing of even date herewith, to the party of the second part all their right, title and interest in and to all of the above named patents and inventions granted or to be granted, said assignment being made in consideration of the royalty herein agreed upon to be paid to the parties of the first part, and the covenants and agreements herein agreed upon to be kept and performed by the party of the second part
- II. For the same consideration it is further agreed that the party of the second part shall have, and it is hereby given, the exclusive right to use the name "Disarow" and also the name "Win-ner" as trade-marks or trade-names of churus or butterworkers, combined machines, or otherwise, and said first parties jointly and severally covenant and agree not to engage in the churn or butterworker business, either manufacturing or selling and not to use or consent to the use by others (except the party of the second part) of the name "Disbrow", or the name "Winner", as the trade-mark or trade-name of any Combined Churn or Butterworker, or of any churn, or of any butterworker, or to the use of either of the names "Disbrow" or "Winner", as the name or a part of the name of any Company or concern engaged either in the manufacture or selling of any kind of churus or butterworkers, either Combined Machines or otherwise, during the life of said patents or this contract. This contract shall not be construed as prohibiting the parties of the first part from selling either the "Diabrow" or the "Winner" churns made by said second party. ..

III. The parties of the first and second parts hereby acknowlge, accept, and agree to a full and complete settlement under said aignment of October ad, 1893, on the following basis, to-wit:

The parties of the first part jointly and severally release, quitclaim, and set over to the parties of the second part all their right, title and interest in and to all patterns, churus and butterworkers made under the provision of said assignment or contract of Octoper ad, 1873, and release said second party from all the obliga-tions and requirements of said assignment and contract, and said party of the second part hereby releases said parties of the first part, and each of them, from the extigations and requirements of said surjections and contract, and said party of the mount part also berein relations said parties of the first part, and each of them from all claim or claims arising from moneys paid by said parties of the mount part under said contract or otherwise to us on accommon will parties of the first parties either of them.

IV. In Gen and in place of the interest is the profits from the manufacture and asks of said Genekined Charms and Buttermarkeys married to Benbas B. Diabetor and Darina W. Payers under said anisometr of Genekin all thigs said party of the network party of the network party of the first part, in consideration of the anagement to said party of the second part of said patents and inventions a moralty on each Combined Charm and Butterworker made and sold by said patty of the second part of said patents or any of them or otherwise, said reputly to be based on the expacity in cubic inches of the dram or harrel of each machine, and to be in accordance with the following table or scale, to wit:

Present Present	Diameter	Length	
Number Name	of Drum	of Drum	Regalty
			\$1.00
			\$1.50
3 Winner	49 in.	43 in.	\$6,00
4 Winner	49 in.	49 in.	\$5.50
3 Distrow	49 in.	49 in.	\$5.50
3 Winner	40 in	64 in.	\$6.00
4 Disbrow	49 in.	64 in.	\$5.00
6 Winer	e) in	72 in.	\$7.00
S Diebrow	40 in.	79 in.	\$3.00
Winner	O'm	73 in.	\$8.00
6 Dieheow	e) in.	74 in.	\$9.50
8 Winner	49 in.	74 in.	\$9.50
7 Distrow	40 in.	ro8 in.	\$11.00
9 Winner	ayin.	Josin.	\$10.00
10 Winner	øin.	roß in.	\$11.00
		Section of the Contract of the	<b>图</b> 图图图 Andrews

The thore specified toyalties for the present so called Winner linethness are to be taken as the basis of competation for the allocation are to be taken as the basis of competation for the allocation toyalty to be post on obtain since of machines, should not be under took took if mechanics are built having capacities of dramatinging by two as to capacities of any two above cannot so called Winner the words to be the name as the royalty of the Winner to the built have been also be the same as the royalty of the Winner to the built mathematical according to the capacity of

W. It is beenly agreed that sult purp of the second part shall pay to said Disbrow Manufacturing Company the above specified royalty on all Combined Charms and Butterworkers manufactured and sold by a charting the die of this contract. I shelter said malificate contains any of the features of any of said parents or soft but said second party may be minute this hostract at any time by transfering to said Disbrow Manufacturing Company all rights are quired by said second party from R. B. Disbrow and D. W. Payes under said assignment of October ad, (8)3, or under this contract or the assignment from said first parties of even date herewith.

VI. The party of the second part having of even date herewith made an arrangement whereby the Creamery Package Manufacturing Company of Chicago, III., is to become the exclusive purchaser of all Combined Churus and butterworkers manufactured by said party of the accord part under said patents, it is hereby agreed that the said Creamery Package Manufacturing Company, shall, and they hereby are authorized and directed to deduct from the purchase price of each such machine purchased by it from said party of the second part, the above specified royalty, and pay the same the The Disbrow Manufacturing Company, one of said parties of the first part.

Said party of the second part further agrees to require said Creamery Package Manufacturing Company, to bind itself to pay said scyalties to the said Disbrow Manufacturing Company, one of the parties of the first part, on all such Combined Churus and Betterworkers purchased and sold by said Creamery Package Manufacturing Company, and to report all such paychases and saies to said Disbrow Manufacturing Company, between the untand 15th days of each month for the previous month's business.

So long as said Creamery Package Manufacturing Company continues to purchase said Combined Churns and Butterworkers from said pary of the record part, and to pay to said The Disbrow Manufacturing Company for the first year at the time for making each report the royalties then due. After the first year the report to be made and royalties to be paid quarterly, between the first and rath of the mouth of January, April, July and October, in such year. Should the sales arrangement between said party of the second part and the said Creamery Package Manufacturing Company be discontinued, then and thereafter said jurity of the second part agrees to report at the times above specified to the Disbrow Manufacturing Company the sales of all such Combined

Charter and District vertices making by it, and to pay up the times of watching each report the respection than the six accordance with the above with the street and south south report that properties to be small to the second the second that the second the second that the second that

The parties of the second part bereby (cleans the parties of the transport and these various and the sellers and eserts of some Of Winner thanks formations used and sold from all claims for a frequency of parties that doing in force of this party of the second party

Will be further agreed that said parties of the first part may will for their own beautit six so-called "Winner" Machines now makes proving of apportruction by them.

The pairty of the second part shall have and is given the tight to proceed in its own name all infringements of any patent or potents himstolive at hereafter acquired by it from said parties of the few part or either of them, whether said infringements have sensed or may hereafter deem. That all expenses of such proceeding shall be home by said party of the second part, and all recovering shall be for its exclusive use and benefit, and said party of the first part shall have no interest therein or an amount thereof.

to the any such litigation said parties of the first part agree minths and severally to give to said party of the second part, but obtain a green to themselves, any information or assistance that there are, and should it prove secretary, said party of the second age to inchorated to make said first parties co-plaintiffs with itself in the proventation of infringers of any patents acquired by aid party of the accord part from the parties of the first part, or any of them.

The coyalties is in provided are to be paid on all modifies sold on and after this date by said parties of the second such

ACC. The perty of the record pair berso; agrees to purchase to the control foreign and imachines, took, safe pump operate to record a control to the first parts of the first parts of the parties from it the control to the property of the parties from it the control to the property of Combined Chains And Decreased to the control to the parties and parties and parties and parties of the control to the parties of the parties of the control to the parties of the control to the control to the parties of the control to the control to the parties of the control to the control

and silf stock and materials at cost according to the laveled there it. Said machines tooks, patterns and materials to be paid for open the execution and delivery of a bill of sale thereof and the delivery of such machines, tooks, patterns and materials as Manhato, free from all liens or claims by other parties. Said parties of the first and second parts to divide equally Expanses of busing and machines, etc., on board car at Manhato.

XIII. All suits now pends activities and parties, including a suit brought by said party of the second part against the Berlin & Summit Creamery Association, are to be dismissed upon the execution of this contract, each parties paying its own costs.

This contract extends so and is binding upon the successors,

This contract extends to and is binding upon the successors, being legal representatives or assigns of the several parties hereto.

IN TESTIMONY WHEREOF, both parties hereto have sub-

IN TESTIMONY WHEREOF, both parties hereto have subactibed their names and affixed their seals on the day and year first above written.

Signed, sealed and delivered in presence of:
D. W. PARSONS,
WALTER McBROOM,

SEAL THE DISBROW MANUFACTURING CO.

REUBEN B. DISBROW, President. DARIUS W. PAYNE, Secretary.

(SEAL) OWATONNA MANUFACTURING CO., D. J. AMES, President

T. J. HOWE, Secretary.

THE DISBROW MANUFACTURING CQ.

Corporate Seal) Maukato, Mina.,

REUBEN B DISBROW, (SEAL) LEVI A DISBROW (SEAL) DARIUS W PAYNE (SEAL) HORATIO N SEELYE (SEAL)

STATE OF MINNESOTA, County of Blue Earth

On the no day of April, A. D. 1897, before me, a Notary public, within and for said county, personally came Reuben H. Disbrow at Darine W. Payres, who being awarn, did say, that they are been and exercisely, suspectively, of The Disbrow Manufacture.

corporation dispressions accorporated to have of the state of Minnests, that the se-impressed hereon is the seal of said corpor inconsecutives appear and collection cation by authority of the Board of Di Reuben B. Dishrow and Durius W. Payne each I instrument to be the free act and deed of said

WALTER MCBROOM. Notary Public,

(NOTABLAL SEAL)

Blue Earth County, Minnesota.

STATE OF MINNESOTA

County of Blue Earth.

On this 20th day of April, A. D. 1897, before me, a Notary Public within and for said county, personally came Reuben B. Disbrow, Levi A. Disbrow, Darius W. Payne and Horatio N. Seelye, personally known to me to be the identical persons described in, and who executed the foregoing instrument, and each for himself acknowledges the execution of the foregoing instrument to be his volutary act and deed. (Signed)

WALTER McBROOM. Notary Public,

(NOTARIAL SEAL)

Blue Earth County, Minnesota.

STATE OF MINNESOTA County of Blue Earth.

On this 20th day of April, A. D. 1897, before me a Notary Publie within and for said county, personally came D. J. Ames and T. J. Howe, who being duly awarn, did say that they are the Presitheir and Secretary, respectively, of Owatonna Manufacturing Company, a corporation duly organized, incorporated and existing codes the laws of the state of Minnesota; that said corporation has no seal, and that the foregoing instrument was signed and aled by them in behalf of said corporation by authority of its and of Directors, and said D. J. Ames and T. J. Howe each ackd said instrument to be the free act and deed of said

WALTER MCBROOM. Notary Public

HAL SEALS

de County Missessia.

Whereas, Letters Patent of the United States were issued to Reuben B. Distrow and Daries W. Payoe on the 17th day of January 1893, N. 450, 105; for Combined Churn and Hutterworker; and whereas, other letters patent upon Combined Churn and Bitterworkers have since been issued, as follows, to-wit:

No. 527,673 dated October 16th, 1894; to Residen B. District. No. 527,716 dated October 16th, 1894 to Darius W. Payne.

No. 564,977 dated Aug. 4th, 1896 to Reuben B. Disbrow. No. 564,978 dated Aug. 4th, 1896 to Levi A. Disbrow.

and, whereas a certain application for patent upon Combined Churus and Butterworkers trade in the name of Renbert B. Disbrow serial No. 598,856 filed July 11th, 1896, allowed November 25th, 1896 is now pending in the United States Patent Office; and

Whereas, the undersigned are the pieners of said letters patent and of all rights in and to the inventions covered thereby except such rights as were conveyed to the Owatonas Manufacturing Company on the 2nd day of October, 1893, by that certain instrument executed on said 2nd day of October, 1893, by said Reuben B. Disbrow and said Darius W. Payne of the one part, and the Owatonna Manufacturing Company of the other part and recorded in the United States Patent Office, October 16th, 1894, in Liber R. 48, Page 373 of Transfers of Patents; and

Whereas, the said Owatonna Manufacturing Company is desirous of acquiring the entire right, title and interest in and to all of said letter patent and invention, and in and to all claims for the past use and infringement of said patents, or any of them,

Now, therefore, be it known, that we, the undersigned, for and if consideration of the sum of One Dollar to each of as in hard paid by the said Owatonna Manufacturing Company, the receipt where-of is hereby acknowledged, and in further consideration of the covenants and agreements contained in a certain contract executed of even date herewith, by the undersigned as parties of the first part, and the Owatonna Manufacturing Company, a corporation organized and existing under the laws of the State of Missecots, and having its principal place of business at Owatonna, as the party of the second part, have sold, assigned, transferred and conveyed, and by those presents do sell, usuign, transfer and conveyed, and by those presents do sell, usuign, transfer and convey to the said Owatonna Manufacturing Company, its associators or assigns the entire right, title and interest is and to said here patent, and in and to the inventions secured thereby and in and to the inventions occurred by said pending application, and is and so all modifications or improvements upon any of said inventions

or patents, or in and to any other inventions that have heretofort or may hereafter be made or invented by the undersigned, or any of us, pertaining, relating, or applicable to any kind of Combined Churn and Butterworvers, for its own use and benefit, and for the use and benefit of its successors and assigns, to the full and of the torm for which said letters patent have been, or may be grented.

This assignment is made under and in pursuance of the provisions of that certain contract entered into of even date herewith, between the undersigned as parties of the first part, and the said Owntonna Manufacturing Company as party of the second part.

IN TESTIMONY WHEREOF, the undersigned. The Disbrow Manufacturing Company has caused these presents to be executed by its President and attested by its Secretary, and its corporate seal to be affixed, and the other undersigned have hereto set their bands and seals at Manifato, Minnesota, this 21st day of April, A. D. 1807.

(SEAL)

## THE DISBROW MANUFACTURING CO.

REUBEN B. DISBROW, President.
DARIUS W. PAYNE, Secretary.
REUBEN B. DISBROW. (SEAL)
DARIUS W. PAYNE, (SEAL)
LEVI A. DISBROW, (SEAL)
HORATIO N. SEELEY. (SEAL)

In presence of S. B. SWEENEY.
D. W. PARSON.

STATE OF MINNESOTA, County of Blue Barth.

On this arst day of April, A. D. 1897 before me, a notary public, within and for said county, personally came Reuben B. Disbrow and Darius W. Payne, who being sworn, did say, that they are the president and sacretary, respectively, of the Disbrow Manufacturing Company, a corporation duly organized, incorporated and existing under the laws of the State of Minnesota, that the seal hereto attached and impressed hereon is the seal of said corporation and that the foregoing firstrument was signed, and sealed by them in behalf of said corporation by authority of its Bourd of Directors, and said Rouben B. Disbrow and Darius W. Payne such acknowledged said instrument to be the free act and deed

of said cosporation.

DAVID W. PARSON. Notary Public, Hemepin County, Minnesota.

STATE OF MINNESOTA, County of Blue Earth.

On this 21st day of April, A. D. 1897 before me, a notary public, within and for said county, personally came Reuben B. Disbrow, Levi A. Disbrow, Darius W. Payne and Horatio N. Seeley. personally known to me to be the identical persons describe and who executed the foregoing instrument and each for himself acknowledged the execution of the foregoing instrument to be his voluntary act and deed.

DAVID W. PARSONS Notary Public, Hennepin County, Minnesota,

## EXHIBIT B (11).

MEMORANDUM of agreement made and concluded at Mankato, Minnesots, this 19th day of April, A. D. 1897, by and between Reuben B. Disbrow, Darius W. Payne, Levi A. Disbrow, Horatio N. Seelye, The Diabrow Manufacturing Company, a corporation organized under the laws of the state of Minnesota, having its principal place of business in Mankato, Minnesota, parties of the first part, and the Creamery Package Manufacturing Company, a corporation organized under the laws of the state of Illinois and having its principal place of business at Chicago, Illinois, party of the second part, WITNESSETH:

That, whereas, the said Reuben B. Disbrow, Darius W. Payne Levi A. Disbrow, Horatio N. Seelye, as a co-partnership under the firm name and style of Disbro. Manufacturing Company, and the said party of the second part on the 1sth day of October, 1806, entered into a certain contract wherein and whereby the said partmership promised and agreed to manufacture and sell to said party of the second part certain Combined Churas and Butterworkers. and wherein said party of the second part was constituted and appointed the exclusive sales agent for all combined churns and butterworkers manufactured by said partnership, and wherein said partnership mortgaged their manufacturing plant, machinery and stock to said party of the second part.

And whereas, by mutual agreement by all parties bereto, all

the act parties of the first part have by a carmin increases. In orders of come data becoments, reference to which is hereby held and on the carmin into a certain contract with the Owntones Manufacturing Company, a corporation organized under the laws of the state of Minnesota, and having its principal place of the pass at Owntones. Minnesota, and having its principal place of the pass at Owntones. Minnesota, whether the said parties of the first part all and singular have covernanted and agreed to discontinue the manufacture and sale of Combined Churas and Butterworkers, and wherein the said Operatores Manufacturing Company has covernanted and agreed to pay to taid the Disbroy Manufacturing Company regratals revealed to day their during the life of certain Dated States manufactured and hold by their during the life of certain United States formers patent statement to said Ownhouse Marie factoring Company by a certain other contract of even date here incriming Company by a certain other contract write reference of which is also had said made.

AND WHEREAS, the said Greenery Package Manufacturing Company and the said Owntones Manufacturing Company by the mutual agreement of all parties hereto, have entered into a cer-tain other contract of even date berowith, reference so which is thereby had and made wherein the held Creamery Puckage Manufacturing Company has been appointed the exclusive sales agent his all Combined Obstrue and Butter-workers massisionared by naid Owntowns Manufacturing Company wherein the said Owntowns Manufacturing Company wherein the said Owntowns Manufacturing Company has unthorized and directed the said Creamery Puckage Manufacturing Company to pay the coyalting provided by mid count at between acid parties of the first part and said Owntowns Manufacturing Company.

Now, therefore, he is known that in consideration of the presented the said party of the second part has provided and agreed to contact the said party of the second part has provided and agreed to

and with the said parties of the first part on follower; country:

First: Toward carry of the uncount pair does hereby, friend and discharge the said party of the first part from all their and its utilizations to mid party of the second party under said so

transe. The anti-party of the meaning part done barely promed agree to give to sold party of the few part of good and and an anti-party of the few parts of good and and an anti-party of the few parts of an artist manager barelesses from the few parts of any and all arms found the main party party and all arms found the main party party and all arms found the main party party and all arms for the few party party and all arms for the few party party and all arms for the few party party and the few party party party and the few party par

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In tendencey observed, the oald pasties have been and to affined bein bands and each the day and year becausers written.

(Date Conclude exerted by all the state therein)

### EXHIBIT C

Chicago, Ill., Jan. 22, 1900.
This agreement made and entered into by and between Martin Deep and Donais & Virtue, both of Owntonza, Minn., party of the set part, and the Cremery Phy Mig. Co., of Chicago, Ill., a committee of Illinois, and the Coroles, Cartis & Greene Mig. Co., of the Athinson, Wis., a composition of Wisconsin; party of the second part, Wisconstate

First, that the party of the first part, has in construction of state together, beginning to see I hand trate the said second the two contracts right to manufacture the Construct Chien and despected under their potent No. (QLOY), for a partial of three despected under their potent No. (QLOY), for a partial of three

The cold original party, the consideration of the unclinate state much party the state of the unclinate state much being the party the state of a part contribution. It provides the party of the state of a party beauty of the party of the p

a fact party factor agrees to pay for our complete on of

patterns from which the first churn is to be made. Said Marrin Dieg of the first part, to have a banck ha the factory of the party of the eccord part, reat free, and to draw such rate of wages as agreed upon with said D. E. Virtue, said amount of wages not to exceed Saig per day, and to be advanced by this second party, by then to be deducted from the royalities due said first party upon this contract. Such material, labor said machine work as furnished by second party, to be charged into cost of patterns and deducted from royalities.

The party of the first part agree that they will not manufacture or license others to manufacture said churn and worker, or any improvements, modifications or any similar machine for the churning and working of butter, during the term of this contract.

The party of the second part agree to make said combined churn and worker, and push to completion a test churn on completion of pattern to put same into actual operation, in order that the weak parts, it say, may be developed and corrected. Upon the completion of said test and corrections in construction, if any are needed, to at once commence the regular construction of the churn and worker for the market, to do a reasonable amount of advertising to promote the sale of the same.

The party of the account part agree to keep a complete record of churns orante and sold, to number each machine serially, commencing with too, and to render to first party every three months a statement showing churns made, sold and on hand, and at same time, with report, to account to said first party for royalties due.

The suid first party reserve the right to improve said chern, and worker, and agree to ours all eyels improvements, as they may make from time to time to second party; as long as second party shall make and sell same under this contract, and said second party agree that any improvements they may make upon this churn and worker shall be the property of the party of the first part.

The said first party agrees to defend said patent, together with all improvements under which this contract is operative, against any and all infringement onto, agreeing for themselves that all resulties shall first be applied upon the payment of money advanced for patterns, and that after said amount is repaid subsequent royalties shall, for a period of one year, he withheld by second party as a guarantee against they and all infringement suits, he has party to defend the patent against sets or to bring action assure infringers. In the event of failure on the part of the first party to defend action for infringement or so bring action against infringers, then second party to be example from payment of royal-

and the validity of said patent No. 534.074, shall be ustab-

It is understood and agreed that the first party shall buy all of the machines that they shall require from the party of the first part at jobbers' prices, it being understood that said first party shall not enter the field as general jobbers of churas and workers or of creamery supplies, but are privileged to buy a limited number of machines at a price aguated to that charged general labbing trade.

In witness whereof we have hereunto set our hands and seals the day and date first above written.

DENNIS E VIRTUE, (SEAL)
CREAMERY PACKAGE MFG. CO. (SEAL)
W. W. SHERWIN, Mgr.

CORNISH, CURTIS & GREENE MFG. CO. (SEAL)
S. S. SWASEY, Treasurer. (SEAL)

# EXHIBIT D (1)

# CIRCUIT COURT OF THE UNITED STATES,

District of Minnesota-First Division.

OWATONNA MANUFACTURING COMPANY, Complaints

78.

OWATONNA FANNING MILL COMPANY & D. E. VIRTUE, Defendants.

## BILL OF COMPLAINT.

To the Honorable, the Judges, of the United States Circuit Court for the District of Minnesota, First Division:

3

The Owatonna Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota and liaving its principal place of business in Owatonna, in the county of Steele, in cald state of Minnesota, and a citizen of

terl there goes your cratter complaints and says that your orner terms of the property of the form of the country of Steels, in said State of States of States of Mineof States of Mineof States of Mineof States of Mineof States of the Laws of States and the Downing its principal place of Resiment Overstones, or said country and states and that D. E. Virtue
to these of the United States and a resident of Overstones, in
the country and states and that mid D. E. Virtue is the country of
the laws of the regular country of overstones. Familiar Mill
managery is in absolute country of court country and directs and
forms if of the business affairs.

And your amore further shows anto your honors that hereto-cash prior to the atth-tag of Desember, they. Thomas J. Honor, will J. Anne, and Henry H. La Bare, all of said Owatones, in another and other observed were the original, first and joint in-tered of contain new and metal improvements in combined with not becomesters, tally described in the letters parent statice countried, which had not been known or used by set in this country, and not patiented or described in any printed likeling in this or say foreign country before this invention or covery thereof, and not in publication for each letters patient.

to dealer factors there is no year bosons that the tall form. Dealed form, and there is the tall the tall form. Dealer form and factors be caused at tall 2 approvements to the control of the control of

organization of categories and that the confidence and requirements of the constituent of categories and the runs; and requirements of the constituent of categories through in all temperes, been complete with extens parent of the United States has said invention were, on the end, that of Justes Baze, in one form of law, under the teal of the parent office of the United States, signed by the recentary of the material and communication by the communication of parents and hearing date the day and year aforemed, and manufered \$25,100, whereby there was granted and secured to the said Thomas J. Howe, David J. Americal Henry N. La Bare and to their heirs and acategor, for the term of seventeen years, from and after the date of said letters parent, the full and exclusive right and therry of making, using, and wending to others to be used the said invention and improvements set forth in mid-letters patent as in and by said original letters patent of a duly certified copy thereof, in court to be produced will more tally appear, a copy of the specification and drawings of said letters patent hereto annexed and marked "Exhibit A."

3

And your orator further shows unto your honors that on the 4th day of August 1807, said Thomas J. Hows. David J. Ames and Henry N. LaTher were the owners of said letters patent No. 585-100, and of all rights and interespectation thereby said of the invention covered by said letters patent and that the said Howe. Ames and LaBare, by an instrument in writing, dated the 4th day of August, 1807, and executed by them, granted and assigned to your orator, its associators, and satigns, the entire right title and interest in and to the said patent and in and to the invention secured thereby, and in and to all claims for the past use or infringement of said patent, the same to be hald by your orator, for its own use and for the use of its successors and assigns to the full end of the term of which said letters patent are, or may be, granted, which said assignment and grant was duly recorded in the patent office of the United States on the 7th day of August, 1897, in Liber Y-55, page 540 of Transfers of Patents, and your orator is now inverted in the sole right and title in, to and under said letters untent, as in and by said instrument in writing, or a duly certified copy there of 12 court to be produced, will more fully appear.

6

And year-orator further aver sand shows with your become that by the conductive or the presence your orator became continue to the right and exclusive owners of said letters patent and of all the rights and

8

And your oration further every and shows that your honors that the horseston and improvements set forth and described its said letters patient are of great value and utility, and that the trade and public towe generally acquiresced in the validity of said letters patient and have recognized the rights of your orator in and under the same, and that, if your orator can receive lawful protection against infrongers, the said letters patient will be of great value to it, and that great profits will accrue to it therefrom.

8

and your contor further even and shows unto your leasons that could defend to the rights and the premises, and the rights and the property and contriving to injure your orator and contriving to injure your or of the profits, besefits and advantages, and the fact of the language section it will be the the control is the control of the invention set forth therein, since a last of said letters patent and before the commencement of the me, here, without the license and authority, and against the license and authority, and against the license and some crater, and against the fringeness of the aforessid letters patent, at Owatonna, in the extint of Minnesota, first division, and elsewhere throughout the six of Minnesota, and throughout the United States, made, and state of Missessots, and throughout the United States, made, and caused to be made, and have used and have verified to others to be used, large numbers of combined charms and butterworkers containing the superovements and invention described in said letters patent No. 5.5, no. dated June and, 1897, and recited in the claims thereof, and that said defendants are continuing, and intend to continue so to do, but to what said defendants have made use of the and invention and improvements described and claimed in said letters patent No. 585, no., and how many combined churns and butterworkers, embracing in their construction and operation the said invention, or substantial and material parts thereof, the said defendants have made or used or worded to others to be used, your scater does not know and prays differency thereof.

Your crains further thous unto your honors, that all of the making the characters and butterworkers maked specied by your orator rate wild better patent. No. 505, 105, have been marked "Patented." by the wild the lay and your of the ketters patent.

And your orator further shows unto your tonors that the said detendants have had actice of said invention and patent, and have been requested to refrain and desire from the infragement thereof, but have refused so to do, and still continue to infringe upon said letters patent, and to manufacture, use, and vend to others to be used combined churus and butterworkers containing and embodying the invention and improvements accured by said letters patent.

11

And your orator further shows unto your honors that said delendants have received and enjoyed, and are still receiving and enloying great gains, profits, and advantages from the unlawful use of said invention set forth in said letters patent, which might and otherwise would have been obtained by your orator and to which your orator is entitled, but how much exactly your orator does not know, and prays discovery thereof.

12

And your orator prays that the said defendants may be compelled, by decree of this court to account for and pay over to your orator all such gains and profits as have accound to, or have been earned or received by, said defendants from the unlawful use of the said invention described and claimed in said letters patent, and from the infringement thereof as aforesaid, and in addition to pay the damages, sustained by your orator from such infringement.

13

And your orator further shows unto your honors that by reason of the premises and the infringement of said letters patent by said defendants, your orator has suffered damages in the full sum of ten thousand (\$10,000) dollars, and your orator prays that upon the rendering of a decree for infringement, as herein prayed, your basons may proceed to assess, or cause to be assessed under your direction, in addition to the profits and gains to be accounted for by the defendants aloresaid, the damages sustained by your orator by reason of the aforesaid infringement, and that your bosons may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the willful and unjust infringement by said defendants, as herein see forth.

14

And your orator further prays that the said defendants, and

The property of the property o

And the center further pages that a preliminary or provisional president may be broad out of and under the sect of this from the center of the

The state of the s

# OF BRANK IA BARE FOR

PAUL & PAUL.
Solicion for Company
A. C. PAUL of Commet.

STATE HE MINNESOTAL COURS of State

Frenk La lines same before the star day percently and beauty by use, first duly every, depoins and says as it is me president to the Constraint Manifestoring Company, discompanies annually extensional facilities and the foregoing bill of complaint; that he has said that the serve in true of his sean known decreases a to see the said that the serve in true of his sean knownedge, accept as to see the set there is fixed dipon information and belter and as to these unities bechalises in it to be true. And deponent further any that he verify believes that the said Thomas I, Move David J. Almes and Honry N. LaBare were the first original and joint in ventors of the says and assist improvements in its combined charge and better workers set both in honers penalt. No objects, realising the foregoing bill of our staint, and further, that he verify believes that the said complaints at diverge and all in the heated treated of said letters patent.

FRANK LA BARE

Selectived and errors to before me this 5th day of July, 1904. LEWIS L. WHRELOCK.

Notary Public Steels County Musics

(SEAL)

EXHIBIT D (2).

UNITED STATES CIRCUIT COURT. Displic of Minuscots—Fourt. Division.

OWATONNA MANUPACTURING GOMPASTE Company

# OWATONNA FANNING MILE COMPANY, and DE VIRTUE, Defendants.

# (IN EQUITY.)

#### ANSWER

The answer of the Owatonna Fanning Mill Company, and D. E. Virtue, defendants, to the hill of complaint exhibited against them in this court by the Owatonna Manufacturing Company, complainants is an follows:

The defendants now and at all times hereafter, saving and reserving unto themselves all and all manner of benefit of exceptions, which may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies of said bill of Complaint, for answer thereto or to so much thereof as they are advised it is material and necessary for them to make answer unto, said Defendants answering, but not under oath (answer under oath having been waived), say:

The said defendants are not informed except by said Bill of Complaint, whether or not the complainant is a corporation organized and existing under the laws of the State of Minnesota, and a citizen thereof as alleged in said Bill of Complaint and leaves the complainant to make such proof thereof as may be necessary.

•

The Defendants admit that the Owatonna Fanning Mill Company, one of the defendants, is a corporation organized and existing under the laws of the State of Minnesota, and having its principal place of business at Owatonna, in the said state, and further admit that the other defendant, to-wit, the said D. E. Virtue, is a stockholder thereof, and further alleges that he is and has been since the organization of said corporation the president thereof; but said defendants deny that the said D. E. Virtue, is the owner of practically all of the capital stock of said defendant corporation, or that he is in the absolute control thereof, or that he directs or governs all of the business agains of said corporation as alleged in said. Bill of Complaint, by on the contrary said defendants aver that the said D. E. Virtue has no pecuniary interest whatsoever in the business affairs of said defendant corporation otherwise, otherwise as is such sucidental to the fact that he is a stockholder therein, and the defendants further aver that the said D. E. Virtue

has not in any wise directed, governed to sould the his sees affairs of said corporation in his individuel or personal capacity or had unything whatsoever to do with any of the acts or business complained of in the said Bill of Complaint otherwise than simply in his official capacity as the regident of said corporation.

3

The defendants admit that the U. S. Letters Paten, numbered 585,100, mentioned in said Bill of Complaint, were on the 22nd day of June, 1897, issued to the joint applicants, Thomas J. Howe, David J. Ames and Henry N. La Bare, and entitled "Combined Churn Butterworker", but whether or not said joint application for said Letters Patent was made by said Howe, Ames and La Bare in accordance with law, or whether or not said letters patent were issued to said Howe, Ames and La Bare in accordance with law, or whether or not said letters patent were issued to said Howe, Ames with law, as conformity and La Bare in said defendants are not informed, except by said Bill of Complaint, and demand strict proof thereof, but said defendants ceny on information and belief, that the said Letters Patent mestioned in said Bill of Complaint, granted and secured to said Thomas J. Howe, David J. Ames and Henry N. La Bare, their heirs and assigns, for the term of seventeen years after the date of said Letters Patent, or for any term whatsoever the full and exclusive right and liberty of making, using and vending to others to be used, the said alleged invention and improvements, set forth in said Letters Patent, throughout the United States and Territories thereof, as alleged in said Bill of Complaint, or any right whatsoever.

4

The defendants further answering aver that they are not informed, except by said Bill of Complaint, whether or not the said Thomas J. Howe, David J. Ames and Henry N. La Bare ever executed and delivered the alleged instrument of assignment, dated Angust 4th, 1897, as alleged in Paragraph 5 of said Bill of Complaint, or any valid instrument of transfer whatever, at any time, investing in the said complainant either the whole or any part of the title to said Letters Patent, mentioned in said Bill of Complaint, or any right whatsoever thereauder, and demand atrict proof thereof, but defendants deny on information and belief, that the complainant is the sole and exclusive owner of said Letters Patent, and of all the rights and privileges granted and secured thereby, as alleged in Paragraph 6 of said Bill of Complaint, or that it is the owner of any part of the title to the said Letters Patent, or of any

to bring this or any said and the said betters bateau.

Said Defendants further answering on information and belied to the allged invention or improvements set forth and described in said Letters Patent are of great value and utility, a ribed in said Letters ratest at of great value and utility to legid in said Bill of Complaint, or of any value or utility what to yet and deny that the trade and public have generally, or at all acquired in the validity of said Letters Patent, or bacognized any accusive right, or any right selectory of said complainant to the said alteged tays aton or improvements under the said Letters Patent, as alleged, and deny the allegation that if said complainant can receive lawful protection against infringement said Letters Patent will be of great value, or of any value whatsoever, to said complainant, or that great profits of any profits whatsoever, will accuse to said complainant therefrom, as alleged in said Bill of

Said Defendants further answering deny on information and belief that all the combined churas and betterworkers manufactured by said complainant under said Letters Patent \$85,000, were marked with the word "Patentel", together with the day and year of the grant of usid Letters Patent as alleged in said Bill of Complaint, and further deny, on information and belief, that, prior to the bringing of this suit, the said defendants, or either thereof, had any account notice of the existence of said Letters Patent, and the ownership thereof by the complainant, or that the said defendants, or either of them, were ever requested to refrain and do size from the manufacture, sale and use of any combined churse of butter-sorbers alleged to infringe said Letters Patent, of that they or either thorost, have ever futured to desirt and refrain from any briftingement of said Letters Patent, as alleged in said Bill of Complaint. of Completites

Said Defendants, further impresting deary on information and the the contract of the contract

to the property of the state of

Said Defendants, further answering, on information and belief, deny that they have ever, either jointly or severally, deprived said complainant of any profits, gains or advantages which otherwise would have accreed to it from said Letters Patent, or the use of the invention therein set farth, or that they have, in any way, injured said complainant, as alleged in said Bill of Complaint; and said defendants further jointly and severally deny that they have ever received or enjoyed any profits, gains or advantages from the manufacture, sale or use of any combined churn and butterworkers, or any machine, device or thing whatsoever, in infringement of said Letters Patent, or by any anlawful set or thing whatsoever.

Said Defendants, further answering, jointly and severally deny at said complainant has suffered damages in the full suns of ten onesaid (\$10,000), as alleyed to said Bill of Complaint; or that h has suffered any damage. loss or injury whatevers, on account of any set or thing jointly, or severally done by said defend ants in infringements of said Letters Patent No. 585,100, or in viola-tion of any exclusive right of said complainant thereunder, as allog ci, in said Bill of Complaint; but, on the contrary, said of ante over and allege, or information and belief, that they have on, jointly or severally, done any act or thing which has o any damage, loss or injury whater was to said complaint to

mering further, on into . Hours, David J. Aum

or used by others in this country before the alleged invention, the covery or production thereof by sale Howe. Asses and La Bare, and dony that the name had not been patented or described in any prior patent or primed publication is this or any foreign country before the alleged invention, discovery or production thereof by said Hows. Aster and La Bare, is alleged and deny that the said alleged improvement had not been in public use or or sale is this country more than two years prior to the said joint application of the said Hows. Asses and La Bare for said Letters Patent, as alleged in said Bill of Complaint.

#### $\Pi$

Said Defendants further answering, on information and belief, dony that the said Thomas J. Howe, David J. Ames and Henry N. La Berr were the true, original and joint inventors of the allaged improvements in combined churus and butterworkers set forth, described and claimed in said Letters Patent No. 585,100, mentioned in said Bill of Complaint; but, on the contrary, said defendants aver and allege that said pretended invention or improvements in combined churus and butterworkers set forth, described and claimed in said Letter Patent No. 585,100, was the sole invention, discovery or production of one of said joint applicants and patentees, to-wit, the said David J. Ames invented or produced the same without any material angression, or any contribution chatsoever in the way of invention, from the said other two joint applicants and joint patentees, to-wit, said Thomas J. Howe, and said Henry N. La Bare; and because of this fact, defendants allege that the said patent No. 585,000, and every material and substantial part thereof, is invalid and vote, and of no affect in law, for that the same is a joint patent for a sole alleged invention.

#### 13

Said Defendants, further answering, on information and belief, allege and aver that the combined churn and butterworker set forth, described and claimer in said Letter Patent No. 565,700, was not an invention at the time when the name is alleged to have been produced by Howe, Ames and La Bara: that the same did not exhibit or embody any amazantial variation or change from what was old and common and well known in the prior are; and the production of earl, combined churn and butterworker set forth, described and claimed in said Letters Patent, did not in view of the prior are, involve the exercise of the inventive faculty, or constitute the subject matter of invention within the intent and meaning of the

phycht law, but in colors comply containly along practice, within the limitalistic and shell of any confequences practically and that the and Letters Patent No. \$85,000, and overy material and substantial part thereof, are therefore lavalid and vaid, and of no effect in law, for want of patentable neverty and invention, in view of the prior 

Said Defendants, further enswering, on information and bel Said Defendants, further answering, on information and belief, deay that said combined churn and butterworker set forth, described and claimed in said Letters Patent 150. \$85,100, was new or sould at the time when the name was alleged to have been invented or produced by said Howe, Amer and La Bare; but, on the contrary, said defendants aver and allege that said combined churn and butterworker set forth, isocribed and claimed in said Letters Patent, and every material and substantial part thereof, was old used well known in the prior art, and had, prior to any alleged invention or discovery thereof by said Howe, Ancer and La Bare, and more than two years prior to their said joint application, for said United States Letters Patent No. 585,100, been previously patented, described and illustrated in each, and all of the hereinbelow identified Letters Patent, and printed publications to-wit; Letters Patent, and printed publications to-wit:

### U.S. LETTERS PATENT.

2,447—To Wilson & Lee, Feb. 7, 1842, Butterworker 6,726—To L. W. Colver, Sept. 18, 1849, Rotary Churn.

27,175—To E. Ward, Feb. 14, 1860, Churn. 48,449—To J. F. Sanborn, June 27, 1865, Churn.

55,060-To T. W. Pemeroy, June 26, 1886, Churn and Ice Cream

96,777—To A. C. Manon, July 31, 1866, Churn. 98,198—To J. R. Mickey, Sept. 18, 1886, Churn.

90,479—To C. P. Sawyer, July 13, 1869, Bread Machine. 66,122—To F. Blecke, June 25, 1869, Churn.

69,669—To A. H. Brown, Oct. 8, 1867, Chura.
73,134—To S. H. Swissey, Jan. 7, 1868, Barrel Churo.
80,664—To S. L. Hall, Aug. 4, 1868, Rotary Chura.
100,018—To T. & G. M. Mills, Mar. 15, 1870, Ice Crussa Pressers.
18,414—To T. & C. M. Mills, June 1872, Ice Cressa Pressers.
14,600—To William Tyler, May 16, 1871, Improvement in Do

221,100-To Edward L. Walter, Dec. 3, 1871, Improvement in But-

ton to To C. H. Chieb, April 9, 1824, Churan

THE TAX -- TO BE TOMAN SCALE TO, 100% Bloodings One Burney 150/150-11: W. Bloy, Nov. 10: 1074, Sead-Mochanic Sco. 150/250-10: F. Address May 2, 1875, Battery address 150/270-To R. B. & J. G. Chapter N. May, 48, 1875, Reverses

\$1.76 To W O Davis Sept 6 1876 Apparatus for Descipher-3

10,000—To E. Rhoaties, Feb. av. 1877, Rotary Churu. M. 1005—To J. G. Taylor, Jan. 1, 1878, Churu. 15,401—To H. E. A. Schneider, May 13, 1879 Rotary Puddling

ast yes—To R. Ball, Nov. 18, 1879, Centrifugal Churs.

Powers.

20 550—To G. W. Preeman, July 6, 1860, Charms.

20 501—To A. H. Conkling, Nov. 22, 1861, Charms.

20 501—To S. Schiller, Nov. 6, 1863, Apparatus for treating Ofal.

20 10 1. D. O'Dankil, May 6, 1864, Cotton Press.

22 525—To M. H. Dodge, July 20, 1884, Revolving Ore Reasting

obato-To A. C. Chire, Nov. 28, 1884, Chira.

CONTROL OF THE CONTRO

Butterworker.

pripage—The D. W. Chritis, January, 1849. Butterworker.

granze—The C. Christo, Ban. 19, 1849. Butterworker.

pripage—To C. Owens, Dec. 19, 1899. Chara.

profit—To G. Ouens, Dec. 3, 1899. Combined Churc and B

Farge, For the Benevative.

1,50 - To A M Biograph & Co. Hour Combine Co.

450 - To A M Biograph & Co. Abor Combine Co.

1716-To D. W. Payne, Out. 16, 1891, Combined Chart I

Butterworker. \$47,073—To R. R. Dishrow, Get. 16, 1864, Buttersorber. \$57,660—To Brown & Bargo, Apr. 16, 1865, Combined Churn an

Butterworker,

Suntyp-To C. S. Brown, May at, 1803. Combined Churn and
Butterworker.

S19.571-To C. S. Brown, May at, 1895. Combined Churn and Bitt-

Sengor To Brown & Pargo, Dec. 3, 1895, Combined Churn and

### BRITISH PATERIES

1. 17: Of Jame 2, 1667 to Double, for emproved the

1,261-Oi 1875, to Johnson Ritches, for weathing unit abstrator mechines. Scaled Sept. 21, 1875, detail line, 25, 1875.

LB75—Ot 1870, to Stevens, for apparatus for mixing and breading flour, etc., solid Sept. 24, 1870, thated July 2, 1870.

1.500—Of 1879, to Haddan, for improvements in machinery to

mixing and kneading scaled Oct. 21, 1879, Cate

2,312-Of June 11, 1879, to Groevenor.

1,800—Of 1881, to McKey and Russe, for a new and improved dough mixing or breading machine; dated May 3, 1851.
1,305—Of 1889, to Thomson, for a new and improved machine for mixing dough; accepted April 27, 1889, dated May 19, 1889.

### PUBLICATION

The printed publication known to the trade and to the general The printed publication interest to the trade and to the general sublic throughout the United States as the Fenner Catalogues and seculars published in the United States by R. W. Funcer of Scatt needs to New York, in each and every year from 1860 to 1864, in the edition of said Fenner Catalogue printed for said R. W. Fenner by Perry R. Bestum, at Reviews New fort, in the pair 1860, and published by said R. W. Fenner at large and catalogue in language of the front street or title page of which Penner and Tape, 1869, and 1860, reselves follows:

TO HATCH PRESENTED

The vertex lakes of this different op-lates all dime either to hand or power, "Arbitrariof these Charles are made to the to any kind of power."

Minufectured by R. W. Fenner, South Stockton, Chart, Co. N. Y. Correspondence solicited.

France Creamery Churs, a cut and printed dethe hills trating and describing a combined churn and
to the with a double cone variable speed drive applied therealized a higher speed for churning and a lower speed for
the latter and which said cataligue contains another cut
to suchine on the inside page of the front cover, and which
is also further described and referred to with full instruction as and operation thereof at two speeds, on page 1 to
to the outside said materials and aldresses of the
and the cover thereof, and numerous instances of the use of
methics are therein identified, the names and addresses of the
the beautiful the told machines were so used, and the piaces
and living therein set forth; and which said "Penner
the defendance aver and allege was and it, in structure, mode
to defendance aver and allege was and it, in structure, mode
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to defendance aver and allege was and it, in structure, mode
to defendance aver and allege was and it, in structure, mode
to defend the combined churn and butterworker described and claimtend Letters Patent No. 985,100, mentioned in said Bill of
phint

Said Debendance further answering, on information and belief, against over that the said Letters Patent No. \$85,000, mention-maid lift of Complaint, are invalid and void, and of no effect has for the reason that, long prior to the alloged invention, discovery or production of the combined churn and butterworker set a latesthed and chained in said Letters Patent by said Howe, which and columned in said Latters Patent by usin the column land more Lie Bure, as althogod in said built of Commission, and more uses prior to their expelication thereof, many similar commission prior to their workers, advancially identical therewith and said prior of a said and well as a said of countries and remains, were old and well as a said and said by divine prior allocated and said by divine prior and a silvery places throughout the countries, and the half-said prior and and many of the CC in fact that the property year the fact that the control of th

The machine known as the "Penner Church" and the "Penner Creamery Church" made and sold by R. W. Fenner, at South Stockton, New York in each and every year from 1860 to 1864 inchesive, and put into use by him or with his knowledge, at South Stackton, N. Y. Fredorie, N. Y., Stockton, N. Y., and Cassadage, N. Y., Davittville, N. Y., Falleters (or Falcouser), N. Y. Sast Datelmon, N. Y., Kennedy, N. Y., Sherman, N. Y., and High, Ph., and that the present address of said R. W. Fenner is South Speciator, New York.

The 'Fenner Creamery Churn', bought from said R. W. Fenner by E. C. Straight in or prior to 1889, and by him continuously faed, with a variable speed drive applied thereto, at Cassadags, New York, from the date of said purchase to the present time; the said Straight's present address being Cassadags, New York.

The "Fenner Creamery Cause", bought by O. C. Blodgett from said R. W. Fenner on or about the year 1877, and by him then put into use at his creamery at Prodonis, New York, with a variable speed drive applied thereto, and continuously used by him, at said place, from the said date to the present time; said Blodgett's present address being Fredonis, New York.

The "Fenner Churn" used by M. C. Donovan, at Stockton, New York, continuously since 1883, and whose present address is Stockton, New York.

The "Fenner" machine used by Martin Bailey, at Stockton, New York, continuously from 1876 to the present time, said Bailey's present address being Stockton, New York.

The "Fenner" machine used at South Stockton, New York, by Oliver Brownson, continuously from 1876, to the present time; said Brownson's present address being South Stockton, New York,

The "Fenner" machine used by E. F. Rowley, in his creamory is Kennedy, New York, for many years prior to 1894, and whose present address is Kennedy, New York.

The "Fenner" machine used by W. H. Phear, at Sherman, New York, for many years prior to 1894; said Phear's present address being Sherman, New York.

The following named persons, whose present addresses appear opposite their respective names, also had knowledge of the manufacture, sale or has of the said "Fenner" pactring, at the places above named, (Newit:

It can be a constant of the conjust Rivers in the original constant of the conjust Rivers in the original constant of the conjust Rivers in the grant 1833, and the constant of the conjust Rivers in the grant 1833, and the constant of pre-late we be the Owners and Resetted for late we be the Owners and Resetted for the conjust of the rese of the which lust named conjusts in the grant 1835, and the conjust of the rese of the which lust named conjusts in a state of the reset of the following additional named personal beautiful at the following additional named personal state of the sale original Districts methods to so made and conjusts in the persons and conjusts their respective names, had not the persons and conjusts their places, above named

David J. Amer. Himsenoille, Minnesota. W. L. Nayer, (Noneco, Minnesota. Marini Berg. Ownering, Minnesota. W. J. Care, Ownering, Minnesota. Jorone L. Martie, Gustones, Minnesota.

The associate made and sold, and put into use, at Lake Mills, Windowski, by Hans Antistana, pater to 1894, and whose present without it laborates. Wisyonia.

The machine make and set, and put into use, at Lake Mills, process, by D. B. Penge & Co., prior to 1804, and in the year at of which concern Frenk B. Penge was the active hand and maker, and whose present address in Lake Mills, Wisconsin.

The machine known as the "Carrio" machine, made and sold of put into tree, at Fort Attracts, Wisconsin, by David Carris, (2004), and his successors in business and which said anchines are an made, each and used pract to thus, at the said place, with half haspathetic of the shore period Frank B. Pargo.

The sachines made and add and gut into two, it Dander, Kane (1966), by Bobert Twint, whose present address in Dander, State Chesty, (High).

W. L. Phopper, Monaccuth, Phoese.

Cyrae W. Rice, Provinc Phinols.

James F. Owens, Gerlano, Hilmals.

Reach E. Gilmore, Gerlano, Illinois.

W. E. Porter, Gerlano, Illinois.

The Moline Elevatur Co., Moline, Phinois.

15

Said Defendants, further answering, on information and belief, aver and allege that the variable speed mechanism described and claimed in said patent No. 58c, am, applied to the rotary cylinder therein illustrated and described, is unbatannially identical in structure and mode of operation with the variable speed driving derices which have long been in universal use on lather and milling machines, throughout the United States, and been fully described and illustrated in many printed catalogues, and other publications, long prior to the alleged invention or production thereof by said Howe, Ames and La Base, and that the following are leadeness of sech prior printed publications, and prior knowledge and use of such variable speed mechanism in lather and milling machines, to wit:

The catalogue published by the Pond Machine Tool Company, of Worchester, Massachusetts, in 1884, page 1 to 31, and 60 to 61, inclusive, and the machines made and sold in such place, and put into use by said concern, prior to 1894, the present address of said company being Worchester, Mass.

The catalogue of Israel H. Johnson, Jr. & Co., of Philadelphia, Pa., published by said concern in 1888, pages 70 to 75, inclusive and the machines made and sold at said place, and put into use, by said concern, prior to 1894; the present address of said concern being Philadelphia, P.

The lather and milling machinery made and sold by the New Haven Manufacturing Company, of New Haven, Come, and by it put into use prior to 1954, and which said machines were fully its instrated and described in the printed catalogues annually published by and concern, for many years prior to 1856, the present the of said occurry in New Payon, Comp the could slide action back gent, designed and built by him put into use in his raid slop, in the Mins, in 1887, and there continuously used by him a said which is still in existence and located in the baselis said slop, at this time.

The said defectants, further asswering on information and her deny that the complainant has any right to any gains, profits, though, or to any litjunction, provisional or perpetual, as any for in said Bill of Complaint, or to any part of the relief and Bill of Complaint, demanded, or to any relief whatsoever. All of which statements and defenses these defendants are react overs, maintain and prove, as this honorable court shall direct, and they pray hence to be diaminsed, with their reasonable costs and charges in this behalf most wrongfully sustained.

SWATONIA FANNING MILE COMPANY By D. D. WIRTER, President 可能与是 计自由数据 Defenda ita.

WILLIAMS & MERCHANT.
Sollchor for Defendants IAS I WILLIAMSON of Counsel

EXHIBIT D (1)

WITED STATES CIRCUIT COURT.

District of Minsenota-Rough Division

OWATONNA MANUFACTURING COMPANY. Complainant

WATORNA FARRING WILL COMPANY and

#### REPLICATION

The replication of the spove named completining to the survey of one above named definidants:

This replicant, saving and recovering toothest all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the assesser of said defendants, for replication thereinto sayeth that is does used will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing, in said answer contained material or effectual in the law to be replied unto, confessed, or avoid ed, traversed, or denied is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct and humbly as in and by its said bill it has already prayed.

Solicitors for Complainant.

Minneapolis, Minn., Nov. 7, 1904.

EXHIBIT D (4).

UNITED STATES CIRCUIT COURT.

District of Minnesota,-Fourth Division.

OWATONNA MANUFACTURING COMPANY,

Complainant.

OWATONNA FANNING MILL COMPANY and D. E. VIRTUE, Defendants.

IN EQUITY CASE No. 634

### DECREE

This case came on to be heard, before Hon. Charles F. Amition, acting Judge, beginning Jamesry 17th, 1907, and was argued by Mr. A. C. Paul, on behalf of the complainant, and by Mr. James F. Williamsons on behalf of the defendants; and, thereupon, upon consideration thereof, it was and in hereby ordered, adjudged and catreed as follows, to wit

That the patient in suit to set: U.S. Patern No. 386,000, principal to T. J. Howe, D. J. Amer and H. N. La fitter, of date late, must, they, is void for look of invention, in view of the prior strength in additional to the suit of the suit patents. That this area respectively discounted as by the susceptional in the construction while the suit is belong to be defined as the this area for suit is become discounted as the suit in defined and see we will be a suit in the complete sent the small deducator of courts of suit to be sent to this court.

CHARLES F. AMIDON, July.

HENRY D. LANG, Clerk,
By MARGARET C. NOONAN, Deputy.

EXHIBIT E (1).

CORQUIT COURT OF THE UNITED STATES.

District of Minnesons—Pirst Division.

CREAMERY PACKAGE MANUFACTURING COMPANY, Complainant

12.3

OWATONNA FANNING MILL COMPANY and D. F. VIRTUE. Defendants.

IN EQUITY.

BILL OF COMPLAINT.

To the Homersble, the Judges of the United States Circuit Court, for the District of Himnesota, First Division!

The Creamery Package Manufacturing Company, a corporation against and executing under and by virtue of the laws of the state of Oliver, and having its pri/cipal place of business at Chicale, in the control of Cook in said state of Ulfrois, and a citizen of said and Oliferial beings oklassics at Chicale, and a citizen of said and Oliferial beings oklassics at the companies, against the Owner, and control of the Country and the

And therespons your cratter complians and says that your dra-tor is a compount in organized and emissing under and by virtue of the larve of the Seate of Illinois, and herring he principal place of the larve of the Seate of Illinois, and herring he principal place of beateness at Chicago, is the Gounty of Cook, in said State of Illi-nois, and that your creater is a citizen of and state of Illinois, and that the Owntontes Fanning Mill Gountsey is a conporation organ-ized and existing under and by virtue of the laws of the State of Minnesota, and having the principal place of business at Owntonia in said county and state, and that D. E. Virtue is a citizen of the United States and a resident of Owntonia in said county and state, and that said D. E. Virtue is the owner of practically all of the capital stock of said Owntonia Panning Mill Company, is in the sital stock of said Owelouns Panning Mill Company , is in the colute control of said creamery, and directs and governs all of its da re

And your orator further shows unto your houous that heretolore and prior to the 17th day of October, 1804, one Charles S. Brow of Lake Mills, in the County of Jefferson and State of Wisconsin, was the original, first and sole inventor of certain new and in ful improvements in Combined Churus and Butterworkers, fol-described in the letters patent hereinafter manusomed, which had a been known or used by others in this country, and not patented described in any printed publication in this or any foreign count-before his invention or discovery thereof, and not in public us-on sale for more than two years prior to his application for an letters patent.

And your cretor further shows unto your little the contents. S. Brown, being so oftended, the deligion's first and sole is enter of each improvements in Combibed Churas and Bitterson and application to the proper department of the government in the United States for letters patent threefor, it decommon to be then existing acts of chapters in that bound and that cru the letter of October, 1894, by an instrument in writing and for root and valuable consideration, the said Chartes S. Brown assigned the module existing the module and valuable consideration, the said Chartes S. Brown assigned the module exception in and the said favoration as

titles in terms of county, in said State of Wiscount, which assume seem are only recorded in the U1 ted States Pate office on the risk day of Schober, 1804, and the considerations and requirements of the acts of congress, and the Rules and requirements of the acts of congress, and the Rules and requirements of commissioner of Patents having, in all respects, been considered. The letters patent of the United States for said invention, we can first an arranged by the secretary of the interior and countersigned by the Commissioner of Patents, bearing date the day and year tioresaid and numbered \$39,371, whereby there was granted and secured to the said F. B. Fargo Co., and to its successors and assumed to the said F. B. Fargo Co., and to its successors and assigns for the term of seventeen years, from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending to others to be used, the said invention and improvement set forth in said letters patent, as in and by said original letters patent, or a duly certified copy thereof, in court to be produced, will more fully appear, a copy of the specifications and drawings of said letters patent heing hereto annexed and marked "Exhibit A."

And your orator further shows unto your honors that on the son day of May, A. D. 1898, the said F. B. Fargo & Co, were the owners of said letters patent No. 539,371, and of all rights and interests accured thereby, and of the invention covered by said letters patent, and that the said V. B. Fargo & Co, by an instrument in writing dated the 16th day of May, A. D. 1898, and excented by said F. B. Fargo & Co, sold, assigned and transferred unto your orator the whole right, title and interest in and to the said invention and is and to the letters patent. No. 539,371, aforesaid, the same to be held and enjoyed by your orator for its own use and behoof and for the use and behoof of its legal representatives to the full end of the term for which said letters patent are or may be granted, which said instrument in writing was thereafter, on the 1816 may of June, 1898, duly recorded in the patent office of the United Scates in Liber E-58, page 195 of Transfers of Patents, as it and by and instrument in writing, or a duly certified copy there in court to be produced, will more fully appear.

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And your crator area and alrows unto your honors that by vir-

And your oretor further shows unto your honors that becelofore and prior to the gre day of September, 1895, said Charles S. Brewn was the first occurred and sole inventor of certain other and new and neeful improvements in Combined Chrons and Batterworkers, fully described in the letters patent beroinafter mentioned, which had not been below or used by others in this country, and not patented or aestribed in any printed publication in this or any foreign country before his invention or discovery thereof, and not in publication or on sale for more than two years prior to his application for such letters patent.

And your orator further above unto your honors that the said Charles S. Brown, being, as aforesaid, the original, first and sole inventor of that improvements in Combined Charms and Butter-youkers made application to the proper department of the government of the United States for letters patent therefor, in accordance with the then existing acts of congress in that behalf, and that on the 20th day of August, 1895, by an instrument in writing, and for a good and valuable consideration, the said Charles S. Brown assigned the whole right, title and interest in and to said invention to F. B. Fargo & Co., a corporation organized under the laws of the State of Wisconsin and having its principal place of business at Lake Mills, Jefferson County, in said State of Wisconsin, which assignment was duly recorded in the United States Patent Office on the 3rd day of September, 1895, and the conditions and requirements of the acts of congress, and the rules and requirements of the Commissioner of Patento having, in all respects, been compiled with, letters patent of the United States for said invention were, the Commissioner of Patents having in all respects, been compiled with, letters present of the United States for said invention were, on the 12th day of August, 1895, issued to the said F. B. Pargo & Co., in due form of law, under the said of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patenta, bearing date the day and year eforesaid, and numbered \$65,720, whereby there was granted and secured to the said F. B. Pargo & Co., and to its successors and assigns, for the term of seventeen years, from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending to others to be used, the said invention and its nearly seasons and improvements set forth in said letters patent, or a duly ernibed open thereof, a copy of the specifications and drawings of

and Lorers Passes being been

Asia your crasse turner shows note just houses that on the right say of May, A. D. 1878, the said F. B. Furge is Co., were the corners of said letters patient No. 355,720, and of all the rights and interest secured thereby, and of the invention covered by usid letters patient, and that the said E. B. Furge & Co., by an insurance is writing dated the right day of May, A. D. 1878, and executed by earl F. B. Furge & Co., said, analysed and transferred taste your craster the whole right fittle and interest in and to the said invention and in and to said letters patient No. 355,720, aformatid, the same to be held and enjoyed by your crater for its own use and be heat and for the use and behoof of its legal representatives to the

hoof and for the use and behoof of its legal representatives to the full end of the term for which said letters patent are or may be marked, which said instrument in writing was thereafter, on the 2sth day of June, 1808, duly meorded in the Patent Office of the United States in Libre E-58, page 105, of Transfers of Patents, as in and by said instrument in writing, or a duly certified copy thereof, in court to be produced, will more fully appear.

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And your crater avers and shows unto your honors that by virtue of the premises, your center because and now in the cole and anclusive owner of said patent and of all the rights and privileges practed and secured thereby.

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And your country further shows unto your bonces that laterofore, and prior to the 19th day of July, 1859, one William E. Pennand Charles S. Brown, both of Lake Mills, Wissonsia, twere the
original first and joint invanious of certain other and new improments in Combined Charms and Butterworkers, fully described in
the letters patent haveing the mentioned, which had not been income
or used by others in this country, and not patented or described in
any printed publication in this or any foreign country before that
invention or discovery thereof; and not in public use or on talk for
more than two years grier to their application for said between pub-

And your protes further the mi unto your barren that the unit William & Pont and Charles S. Brown, being, as abresid, the

elektak diri and joint berge on a skirt maneraktak di Constinati Corner und themstroothers und auch 1920 of the proper departs.

Let of the properties of the United States and Green patient. therefor in recommon with the then wrinting buth of congress in the bollaif and that on the 14th day of July, 1807, by an instrument the behalf of the court of the continuents, the cold Willian in Piece and Charter in account on igneed the whole right, it
is not interest in and to not known on igneed the whole right, it
is not interest in and to not known on igneed the whole right, it
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complete an operation of the notion to it in its principal
and he for an principal place of the second Late Willia Jafferron
Conty in all State of Whom which accompanies was duly
contest in the United State Interest Office on the search day of July,
the self the conditions and recommendate of the search of congress
at the table and repairments at the Commissioner of Patents
before in ill remets have considered with letters patent of the
United States for hald invention were, on the 8th day of Masses,
which instead to not if ill Panyo & Co., in the form of law sender
the seal of the Interest of the Commissioner of
Patents, because that day and year allowed, and numbered
foo Mil where there was greated and accurred to the bad if B.
Purpo & Co. test to be seen on the beginning and the test of her
contest to be seen the out inventor on a law spatial letters patent, the full
unit exclusive right and liberty of making, using and venting to
others to be seen to be accidentions and drawings of and letters
patent being hereto massed and married "Exhibit C"

And your center further shows into your bonors that on the wish day of May A. D. that the mid X. B. Parge & Co., svery the owner of his letters parent No. 600,108, and of all rights and intents are said they by and of the invention covered by a distribution parent, and that the said F. B. Parge & Co. by an instrument in viting dated the right day of May, A. D. 1868, and excepted by and F. B. Parge & Co., sold accepted and transferred that your content the said factor of informat in and in the said favoration and in the said favoration to be held and entered by your content to be held and entered by your content in the factor, as and in All the the hotter patent Ris. Co., 100, assertical, the case to be held and entered by your content as the computer and in the last content to the held and entered by the content are the computer and in the last content to the held and all the term for the head of its least reserves to less that and the term for the head between parent the content to many to parent a last the last least and the many to parent a last the last least and the many to the last least and the contents and last least and the last least and the last least and the last least and the last least least and the last least leas

with dry of June, 1958, dily recorded in United States in Liber U.57, page 198 of as in and by sold instrument in writing thereof, in court to be produced, will repre fully appear.

And your exacts avers and shows outs your houses that be rictue of the premise, your orator became and now is the sole and exclusive owner of said patent and of all the rights and privilege canted and secured thereby

Your orator further shows unto your honors that the imprevements and inventions see forth and described is said letters patent No. \$39,877. No. \$65,720 and No. 600,168 and claimed in the claims thereof are capable of Con-joint in one and the same combined churn and butterworker; that said improvements and inventions are of great utility; that the trade and public have general sequices at in the validity of said letters patent and recognized the rights of your orator in and under the same, and that, if your orator can receive lawful protection against infringers of said letters patent, the rights and privileges of your orator thereunder will be of great value to it, and great profits and advantages will accrue to it there

Your crator further shows unto your honors that of the con-ned churus and butterworkers manufactured by your prator, in-er said letters patent, have been marked "Patented" together with the days and years of the great of said letters patent.

And your orator further avers and shows unto your lonors, the the orid defendants, well knowing the premiers, and the rights and privileges secured unto your orator, and contriving to injure your orator and to deprive it of the profits, benefits and advantages which might and otherwise would accrue to it from said letters patent, and from the use of the invention set forth therein, and in each thereof since the insee of said letters patent, and such thereof. and since the assignment of used patents to your orator, used before the commencement of this unit, have, without the license as a enthority, and egainst the will of your orator, and in violation of your orator's rights and in infringement of the aforesald letters at-ut and each thereof at Chaptonia, in the district of Minnesota

inst division, and chewhere throughout the state of Minnesota, and throughout the United States, made, and caused to be usede and have used and have vended to others to be used, large authors of combined chorns and buttersurfers, containing the indoversants and inventions described in said letters payent, and each therton, and recited in the claims thereof, and that said defendants are continuing, and intend to continue so to do but to what extent the defendants have made use of said invention and improvements described and claimed in said letters patent, and each thereof, and how may combined churat and butterworkers, embracing in their construction and operation the said inventions, or substantial and material parts thereof the said defendants have made or used, or vended to others to be used, your dratter does not know and prays discovery thereof.

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And your prator further shows unto your honors that the said defendants have bad notice of said infringement and have been requested to refrain and desist therefrom, but have refused so to do, and still continue to infringe upon said betters patent and to manufacture, use and wond to others to besseed, possibled chirms and butterworkers containing and embodying the inventions and improvements accured by said letters patent, and each thereof.

#### 39.

And your orator further shows unto your kiners that the defendants have received and enjoyed and are still receiving and enjoying great gains, profits, and advantages from the unlareful use of the said invention set forth in said letters patent, and such thereof, which might and otherwise would have been obtained by your orator and to which your orator is entitled, but how much exactly your grator does not know and prays discovery thereof.

And your practor prays that the said defendants may be compelled, by decree of this court, to account for and pay over to your practor all such gains and profits as have accrued to, or been earned or received by said defendants from the unlawful use of the said inventions described and claimed in said letters patent and each thereof and from the infringement thereof as aforesaid, and in addition to pay the damages sistained by your prator from such infringement.

by the autochood stopped the the by control of the Alexande Intelligen increase the period demager which he know the particular of many name, of the wilfull and respect infinites to be become act forth.

And your orator farther prays that the and defendants, their afform, arryance deem, attorneys, workings, and associates in nation, and unit and copy one of them, may be perpetually entitled and recreated by injunctions intaining out of, and studies the said this bosonthic court, from directly or indirectly making that an undirectly to others to be used, the said improvements and associated and claimed in said letters patent No.539.57. No. 655780 and No. 650.665 or any one or any part thereof, or any contained them and bettermentary made in accordance there with; that said betters untent may be decreed to be valid, and your record to the the leving owner of the same; and the manufacture, and the distribution of the said defendants may be decreed to pay the case of this suit and that your cratter may have such other and arrived that so the patty of court shall seem street and shall be correctly to equity.

for an innoh, as your praise, can have no adequate relief except as this court, and as such proceedings are contrary to equity, to be test therefore, that the defendants may show, it they can, why can surror should not have the relief hereby prayed, and may showly contrally, which had being being a committee, it is the being being a committee. It

May it please your bonnes to grant auto your crater, not only true of injunction, conformable to the prayers of this bill, but no write of indeposes of respondendum being out of anti-under the seal of this behorable court, directed to the said defendants, bratomia Functing Mill Compage and D. E. Virtue, commanding term, and each of them, as a certain time therein to be named, and under a certain penalty therein to be limited, to be and appearance this behorable court, then and there to unawer time this lift of complaint, and to perform and abide by each order and desert on the premises as to this behorable court may seem meet and may be required by the principles of equity and good conceined.

And your orator will ever pray

# CREAMERY PACKAGE MANUFACTURING CO., By C. H. HIGGS, Vice President & General Management

PAUL & PAUL,
Solicitors for Complainant.
A. C. PAUL,
Of Countel.

STATE OF ILLINOIS

County of Cook.

Personally came before are this day C. H. Higgs, who being not daily sworn, deposes and says that he is the vice president and general manager of the Greamery Package Manufacturing Company, the corporation names as complainant in the foregoing bill a complaint; that he has read the foregoing till a complaint and moves the contents thereof, and that he same is true of his own movinge, except as to much matters as are therein sated upon he offsetion and belief, and as to those matters he believes than the said that is, and depose to further says that he verify believes that the said that is, S. Brown was the first and original inventor of the new and uneful improvements in combined charact and butterworkers at forth in letters patent No. 533,577, and No. 565,750 recited in an oxegolog bill of complaint that that the cand William E. Penn

and Charte h. Reven very the live original and joint inventors is the new and wells) improvements in combined charas and butteworkers set herts in letter patents No. 500,108, secreted in the foregoing fell of complaint, and justice that is verily bullers that the sald complainant above mined is the lawful owner of all of said action patents.

C.H. HIGGS

Submitted and severe to before use this 2d day of July, 1904.

JAMES W. HYDE

Notary Public.

Cook County, Illinois

(SEAL)

## EXHIBIT E (2).

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA, POUP TH DIVISION.

CHEAMERY PACKAGE MANUFACTURING COMPANY, Complainant.

IN EQUITY.

OWATONNA PANNING MILL COMPANY
and D. E. VIRTUE, Defendants.

### ANSWER

The answer of the Gwatonna Panning Mill Company, and D. É. Virtue, defendants, to the bill of Complaint exhibited against them in this court by the Creamery Package Manufacturing Company, complainant is as follows:

The defendants, now and at all times hereafter, saving and reserving unto themselves all and all manner of benefit of exception which may be had or taken to the manifold errors, uncertainties, ensufficiences and imperfections of said Bill of Complaint, for answer thereto, or to so much thereof as they are advised it is material and necessary for them to make answer unto, said defendants increasing but not under each (answer under each baving been material). Says t

The defendants admit that the Owntons Penning Hill Com-uny, one of the defendants, is a corporation organized and exist-g made the laws of the State of Missiesous, and having its prining mader the taws of the State of Minnesons, and faving its principal place of business in Overtonias in said State; and farther simil that the diber defendant, to wil, the said D. E. Virtue, is a stockholder thereof, and allege that he is, and has been since the organization of said corporation, the president thereof; but said defendants deny that the said D. E. Virtue is the owner of practically all of the capital stock of said defendant corporation, or that ally all of the capital stock of said deposition.

be in the absolute control thereof, or that he directs and govcrus all of the business affairs of said corporation, as alloged in said Bill of Complaint, but, on the contrary, said defendants aver that the said D. E. Virtus has no pecuniary interest whatsoever that the axid D. R. Virtue has no pecusiary interest whatsoever in the business affairs of said defendant corporation otherwise than such as is incidental to the fact that he is a stockholder therein and defendants further ever that the said D. R. Virtue has not in anywise, directed, governed or controlled the business affairs of said corporation in his individual or personal capacity, or had anything whatsoever to do with any of the acts or intsinces complained of in the said Bill of Complaint otherwise than simply in his official capacity as the president of said corporation.

The defendants admit that the U.S. Letters Patent No. 539.577, were applied for in the name of Charles S. Brown, and were, on the articles of May, 1895, issued to F.B. Fargo & Co., entitled "Combined Chure and Butterworker"; that the U.S. Letter Patent No. 595,730 were applied for in the name of Charles S. Brown, and were, on the 17th day of August, 1896, issued to F.B. Pargo & Co. entitled "Combined Chure and Butterworker"; and that the U.S. Letters Patent No. 600,168, were applied for jointly by Williams E. Porm and Charles S. Brown, and were, on the 8th day of March, 1896, issued to F.B. Pargo & Co., entitled "Combined Chure and Butterworker"; but whether or not the said several respective applications for the said several respective letters patent were named by said several named application therefore in accordance with law, or whether or not said letters patent were insued

the retrievance of this of Complaint, whether or not the complaint of the control of the control

control and according on the fact that the process of the control and control and the control and control and control and the control and control and

Sent defendants, further susvering, on information and beind jointly and suspensive, dray, that the stud several effects investions in improvements set forth, described and claimed in such several respective letters patent 139,571, 505,700 and consists, are of areas satisfy, as alleged in said Bill of Complaint, or of any when or satisfy a battor was and deary 2.55 the train and publishers generally, or as all, acquireced in the validity obtain several respective letters patent or any thereof, or recognized any co-digitive rights or any right avantanceer, of used complaints to the and accord respective alleged inventions or amprovements. Seattled and claimed it said several letters patent or any thereof, a alleged and claimed it said several letters patent or any thereof, a alleged and denote the siligation that it, and complaints the respective hasful protection against infragement of said several interest patent, or any thereof, the said several letters patent, or any thereof, and additionable of that great profits, or any profits sylutosever, or advantages whatsoever will accreae to each complaining, therefrom, as alleged to taid Bill of Complaint.

sanction between the first the serious and information and the list the serious according to the serious and the serious and the serious and the serious and the serious according to the serious accord

The second of the self-defendant, which is the self-defendant, which is the self-defendant of the self-defenda

can be not the further answering, one intormation and beside being visit to read by show that at the time and place alleged in the Bill's a chapter to read any time or place, they have, etties black to read the continued chains and butterworker, or any making assumption of device of any kind whatever, tenhousing any process as a continued chains and butterworker, or any making assumption of topic described and chained in a particular and inventions of topic described and chained in making the continued of their invalences, or any comparison of the continued and described and chained to another another as a particular and described and chained in add the continued and continued an

The decembers further universary, on interpretation and helicities that have have every either jointly or severally, deprived, or contribute a deprive anid complainant of they profit: gains, bent in a devantage, which otherwise would have account to it from the several letters parent, or any thereby, or the the of the alleged results as thereby as the best or anyl thereby, or the the of the alleged results as thereby as described to injury, and complainant, as alleged at parently in the contribute and made detendants further, bundly the made that they have the several to injury and complain the contribute of the contribute that they have the contribute that the contribute that

that this contributes invites an avering, tourty and accordly to the this faut of the Thomas of Politics (Stonot), as alleged in the best faut of the Thomas of Politics (Stonot), as alleged in rule little of Complaints or that a suffered any damages, has on injury when to the property of the property of the or injury when to said defendants in intringement of half three coveral letters patern 139-571, 505-770 and 600-668 or any thereof, or in wolking, or any eminative right of said complainant thereanist; as alleged in making of complaint; but on the contrary, this defendants over the allege, on information and helici, that they have never jointly of severally, done any act or thing which his caused any carrage loss or in the contrary. long or ming, the cave or me completening

Said defendance, in the ancivering on information and wells, dutive and services deny that the table (Ancies S. Brown was the me original first and sole inventor of the elleged inventions of approximents and forth, described and claimed in said two acceptances to either thereof, and dany that the said alteged inventions of improvements described and claimed in said Bill of Complaints is either thereof, and dany that the said alteged inventions of improvements described and claimed in main two latters patent had not been known or used by other in this country before the alteged invention, discovery or production thereof by until Charles S. Brown, and slavy that the same had not been putented or described in any prior patent or minimal publication in this or any foreign country before the alleged invention, discovery or studiction thereof by said Charles S. Brown, and dany that the said altered inventions had not been in public the or of table in this country to most thus two years often in public the or of table in this country to most thus two years prior to the competitive application of said Charles S. Brown for the said Bill of Complete.

Said defendants norther travering, on information and belief ally and severally day that field William B. Penn and add arises S. Brown were the travership for that Julie inventors the alleged inventions of improvements at facts, described to

claimed in the said sevent No. 600 168 mentioned in said Bill of the Complaint, and deny that the said alleged inventions or improve-ments had not but a known or used by others in this country before the alleged invention, discovery of production thereof by said Wiltions T. Penn Last Charles S. Breesen, and deny that the sair e had and been untented or described in any prior patent or printed publication in this or any foreign country before the alleged lavention discovery or production thereof by William E. Penn and Charles S. Brown, and deny that the said alleged inventions or improvements had not been in public use or on sale in this country more than two years prior to the said joint application of the said William E. Penn and the said Charles S. Brown, for said letter patent fooand allege, on information and belief, that said pretended inven-tions or improvements in combined charms and butterworkers set forth, described and claimed in said patent cos, 168, were not jointly invented, discovered or produced, by said William E. Pens and Charles S. Brown, but were the sole invention, discovery or pro-duction of one of said joint applicants, without any material suggestion, or any contribution in the way of invertion, from the other joint applicant, and that because of this fact, the said patent No. 500,100, and every material and substantial part thereof, is invalid and void and of my effect, in law for that the same is a joint patent for a sole alleged invention.

#### 3.2

Said defendants, further answering on information and belief, deay that the several combined churus and butter-workers set forth, described and claimed in said several letters patent, \$39.571, \$65,780, and 600,168, mentioped in said Bill of Complaint, were inventions, or that any material and substantial part of any thereof was an invention at the time when the same was alleged to have been produced, by the respective applicants for the said respective patent; on the contrary, defendants aver and allege, on information and belief that the said combined churus and butterworkers set both, described and claimed in said several letters patent did not exhibit or embody any substantial variation or change, and material or substantial part of any thereof exhibited or embodied any substantial variation or change from what was old and manner and well known in the prior art; and the production of the invention of the contract of the prior art, involve the answerse of the inventive or constitute the subject matter of invention within the

meaning of the patent law, but involved only ordinary manties, within the knowledge and skill of any ordinary metanic; and that, because of these facts, the said several respective in in parents and each thereof, and every material and substantial pare or each and all thereof, are invalid and wold and of no effect in law, for want of patentable govelty and invention, in view of the prior

Said defendants, further answering on information and belief, deny that said alleged improvements in combined churns and but-terworkers set forth, described and claimed in said several letters patent \$39.571, \$65,720 and \$60,168, mr. stioned in said Bill of Complaint, or any material or substantial ) art of any thereof, were new or novel at the time when the same are alleged to have been invented or produced by the said respective applicants, for said respective patents; but, on the contrary, said defendants aver and allege that said pretended improvements in combined churns and butterworkers set forth, described and claimed in said several respective letters patent, and every material and unistantial part of butterworkers sat forth, described and claimed in said several respective letters patent, and every material and substantial part of all thereof were old and well known in the prior art, and had prior to the alleged invention or discovery thereof by said respective applicants for said respective patents and for more than two years prior to their said respective applications for said several letters patent, been previously patented, described and illustrated in each and all of the hereinbelow identified letters patent, the respective applications for which were filed prior to respective issues or granting dates of the said three several patents 539,571, 355,720 and 600,168 mentioned in said Bill of Complaint, and in the hereinbelow identified orinted publications. inbelow identified printed publications:

### U.S. LETTERS PATENTA

Number Name 25,329, E. Hacckel, 37,090, A. G. Eddy, 52,678, G. Clark, Jr., & L. P. Jenks, a. I. R. Nickey. 66,122 F. Blecks, roogra, T. and G. at. Mills. ta6,560, William Mc. Keever, rozo D. Lee religio, J. L. M. Bookwalter, September to, 1 religio, J. C. Thyler, January 5, 3

tember 6, 1859 ecember 9, 2 ebruary 20,8 tember 18, 1

May 11, 18 227.395; J. Tregurths, June 20, 1880 August 10, 1880 Excember 21, 1880 229,391, J. H. and E. R. Elin 230,856, J. A. Borthwick, 235,710, W. W. Snyder, November 22, 18 240,001 A. N. Conkling, May t, 1883 276,646, P. Thorpe, 277,947, L. S. Seaver, 287,074, W. W. Winn, 287,967, C. Schiller, 298,226, J. D. O'Daniel May 22, 1863 October 43, 1883 November 6, 18 May 6, 188 February 16, 1886 217, W. W. Delano, Jr., November 20, 1888 socous R. Twist. October 1, 1889 December 23, 1890 411.043 A. F. Thayor, ASLATO, I. H. Sambaugh, January 6, 1891 444,270 H. J. Anderson, 471,337, J. C. Humphreys, March 22, 1890 483.201, II. J. Anderson, September 47,18 January 17, 1893 190,105, R. B. Disbrow, October 16, 1894 527,673, R. B. Disbrow, July 25, 1893 501,993, D. W. Curtis, 309,011, J. Winter, 511,274, C. Owens, November 21, 1893 December 19, 1893 511,275, C. Owens 550,687, C. Owens December 19, 1893 December 3,1895 67. F. R. Fargo. February 27, 1894 518,588, D. J. Davis, April 24, 1894 525,580, A. M. Bingham, September 4, 1894 544,719, A. M. Bingham, August 20, 1895 October 16, 1894 527,716, D. W. Payne, 39.570. C. S. Brown, May 21, 1895 May 21, 1895 \$30,571, C. S. Brown, \$50,000 C. S. Brown and F. B. Fargo, December 3, 1895 557,961, C. S. Brown and F. B. Fargo, 564,977, R. B. Disbrow, April 7, 189 August 4, 1896 64.076, L. A. Dishrow, 65.719, C. S. Brows and F. B. Fargo, August 4, 18 August 11, 1896 65,720, C. S. Brown, . 65,791, W. E. Penn, August 11, 18 August 11, 1896 381,180, W. F. Stadtmuller, April 30, 18 May 25, 1897 te 142 F. B. Fargo, 3864, W. E. Penn and C. S. Brown, June 1, 14 85,100, T. J. Howe, D. J. Ames and H. N. LaB are, June 22, 1897 17.600, C. S. Brown and F. B. Fargo,

17,008, T. J. Howe, D. J. Ames and H. M. La Bare, Jan. ac 1898

## BRITISH PATENTS

1408, of July 13 to William Board, Scaled Dec. 52, 1858. 1051, of March 23, 1875, to Johnson Kitchen. 1376, of April 23, 1877, to W. H. Chambers.

## FRENCH PATENTS

No. 66,001, to Galon, of date April 10, 1865, entitled "Mechanical Kneader". Published in ad Series French Patents, Tome 93, page 1-a, Plate 3, of sub-class of "Boulangerie", under the class entitled "Agriculture".

## PUBLICATIONS.

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The Creamery Journal, published at Waterloo, Iowa, November

1894, Vol. 5, No. 50, page 17.

The Creamery Journal, published at Waterloo, Iowa, November 1st, 1894, the illustrated and descriptive article therein appearing shitted "Bingham's Churn and Butterworker".

Hoard's Dairyman, Vol. 24, No. 51, page 820, published at Fort. Atkinson, Wisconsin, February 9, 1894.

Farm and Dairy, page 11, published at Ames, Iowa, March 15th, 1894.

15

Said defendants, further asswering, on information and belief, allege and aver that the said several respective letters patent, \$59.571, \$05.720 and \$600,168, mentioned in said Bill of Complaint, are invalid and void, and of no effect in law, for the mason that long prior to the alleged invention, discovery and production of the combined churn and butterworker set forth, described and claimed in said several respective letters patent, by the respective applicants therefor, as alleged in said Bill of Complaint, and more than two years prior to said respective applications for said respective patents many similar combined churn and batterworkers, substantially identical therewith in structure, mode of operation and results, were old and well known, and had been generally and extensively made, sold and publicly used, by divers persons, a divers places throughout the United States, and that the following are instances of such sales and soage of said old and prior much fines, together with the names and addresses of the persons by whom the same were made, sold or used, or who had knowledge of such old mathines, so made, sold and used, to-wit?

The combined churn and butterworker known as the 'Disbroy's sachuse, made and put into use by R. B. Disbroy at the Christian Creamery, Currentuit, Minnesota, in the year 1503, the said Disbrow's present address being San Bernardine, California; and as made and sold and put lette use by the Owetonna Manufacturing Company, at Overtonna, Minnesota, from on or about October 1523, up to the dates of the respective applications for the said respective several letters patent mentioned in said Bill of Complaint, the present address of which concern is Overtonna, Minnesota, and that the following additional massed persons, whose addresses appear opposite their respective names, had knowledge of the said 'Disbrow' machine, as so made, sold and used, by the persons and concerns, and at the places above named, to-wit:

David J. Ames, Minneapolis, Minn. W. I. Noyes, Orinoco, Minn. Martin Deeg, Owatonna, Minn. W. J. Case, Owatonna, Minn. Jerome L. Martin, Owatonna, Minn. E. T. Winship, Owatonna, Minn. D. E. Virtue, Owatonna, Minn.

The machines reads and sold, and put into use, at Lake Mills, Wisconsin, by Hana Anderson, whose present address is Lake Mills, Wisconsin.

Certain of the machines made and sold and put into use at Lake Mills, Wisconsis, by F. B. Fargo & Co., of which concern Frank B. Fargo is the active head and manager; and whose present address is Lake Mills, Wisconsis.

The machine known as the "Cartis" machine, made and sold and put into use at Fort Athinton, Wisconsin, by David Cartis, (deceased), and his successors in business, with the full knowledge of the above samed Frank B. Fargo.

The machines made and sold and put into use at Dundee, Kane County, Illinois, by Robert Twist, whose present address is Dundee, Kane County, Illinois.

The machine traces to the trade and public as the "Owens' Butter Worker" and the "Owens combined churn and butter-verter", made said and put into the by Charles Owens, and his unconcer is become a self to the Owen. Churs Company, at Meanwith, Directs and observers in the United States, prior to man; the present address of aid Charles Owens, and the gold Owens. Churn Company, being, to the best of defendant's belief, domnouth Illinois; and then the following named persons, whose

addresses approxy appoints their respective names, used, or had movied of the use, of said Overs machines, at Monmouth Ulinois, Calesburgs III. Moline, Ill., and in Spring Grove to stakes near Geriano, Illinois, prior to 1864, to-wift

W	Hopper,		Mon	mouth	TH.
<b>超</b> 计型2012年1月日本2014年1	W. Ric			Poorin	TU:
	R Owe			erland	LISH KWING
	G. Gill	CONTRACTOR OF STREET		erlano	(Killer Street, St.)
	Forter.		STORES AND ADDRESS.		
The L	oline El	cyalor	COS.C	Grant	

The combined churn and butterworker, made and sold and put into use by M. F. Stadtmuller, at the Twin Lake Creamery, Pomeroy, Iowa, in May 1896; and there continued to be used for overtour years thereafter.

The machines known as the "Gingham" Combined Churn and Butterworkers", made, sold and put into use by A. M. Gingham, at Independence, Iowa, on or about August 25, 1894, exhibited at the Iowa State Fair, during the month of September, 1894, beginning September 1, 1894, exhibited and operated at the Iowa State Agricultural College Creamery, at Ames, Iowa, immediately after the close of said fair, 1894, and installed, on or about October 1st, 1894, at the Jasup Creamery, Jesup, Iowa, and thereafter used at said place throughout the remainder of said year 1894, and that the present address of said A. M. Bingham is Port Gibson, Mississippi; and that the following named additional persons, and knowledge of the existence and use of said Bingham machine at the places above noted, to-wit:

Walter C. Ballou. Independence, lowa. Mrs. Walter C. Bailou, Independence, Is. Jesup, Iowa. George Measure, Jesup, lows. E. A. Howie, Jeanp, Towe. F. W. Harris, lesup, laws. D. D. Rubert, Hazelton, Iowa. J. J. Chase. Prof. Fred Leighte is Lincoln, Neb. Minneapolis, Minz. D. J. Ames,

16

Said defendants, further answering, on information and belief, jointly and severally aver and allege that the said letters patent 339,571, issued upon the application of Charles S. Brown, to F. Fargo & Co., May 2221, 1895, mentioned in said Bill of Complaint,

trate the explication of said-Charles 5, Brown, for that which had been in fact towarded by another person than said-Charles 5. Brown, to wit, by the hareinbeture identified A. M. Bingham, within the United States, and who was using reasonable diligence in adapting and parfecting the same, and in the avduction thereof to practice within the United States, at the time of the alleged invention or production, thereof by said-Charles S. Brown; and that because of these facts, the defendants over and allege, on information and belief, the said-letters patent 530,571, and every quaterial and abbetractal part thereof, are invalid and void, and of the effects in the

The said defendants, further answering, on information and belief, deay that the complainant has any right to any gains, profits or damages, or to any injunction, providently belle, day that the complainment has any right to any gains, profits of damages, or to any injunction, provisional or perpetual, as prayed for in said Bill of Complaint, or to any part of the relief in said Bill of Complaint demanded, or to any relief whatsoever.

All of which statements and defenses these defendants are tady to beer, maintain and prove, as this honorable court shall direct, and they pray hence to be dismitted, with their reasonable

costs and charges in this behalf most wrongfully sustained.

OWATONNA FANNING MILL COMPANY. By D. E. VIRTUE, President. D. E. VIRTUE Defendanta.

WILLIAMSON & MERCHANTS Solicitors for Defendants. In P. WILLIAMSON Of Connect

### EXHIBIT E (3).

IN THE UNITED STATES CIRCUIT COURTEDISTRICT OF MINNESOTA FOURTH DIVISION.

CREAMERY PACKAGE MANUFACTURING COMPANY Complainant

WATONNA FANNING MILL COMPANY and

### IN EQUITY.

#### PERMICATION

The replication of the above named complainant, to the interer of the above named defendants:

This replicant, saving and reserving to itself, all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiences of the answer of said defendants, for replication thereunto sayeth that it does and will ever maintain and prove/th said hill to be true, certain and sufficient in the law to be answered unto by said defendants; and that that any other matter or thing in said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied is true; all which matters and things this raplicant is ready to aver, maintain, and prove as this honorable court shall direct and humbly as in and by its said bill it has already prayed.

PAUL and PAUL, Solicitors for Complaint,

Minneapolis, Minn., Nov. 30, 1904.

EXHIBIT E (4).

UNITED STATES CIRCUIT COURT.
District of Minnesota.—Fourth Division.

CREAMERY PACKAGE MANUFACTURING COMPANY, a corporation Complainant

IN EQUITY

OWATONNA FANNING MILL COMPANY.

a Corporation, and D. E. Virtue,

Defendance

No. 623.

## ASSIGNMENT OF COSTS.

Whereas a decree was entered in the above entitled cause on the actt day of January, 1907, wherein it was ordered, adjudged and decreed, among other things

That the complainant shall recover from the defendants its costs, the takes to be taxed in this case, and

Whereas it amount from said decree to the United States Circuit Court or Appeals for the Eighth Circuit was allowed to said defendants, which appeal has now been dismissed by said United States Circuit Court of Appeals.

Now, therefore, he is known that for and in consideration of the sum of One Dollar, and other valuable consideration, to it in hand paid, by the Owatonna Mantifacturing Company, a corporation organized and existing under and by virtue of the laws of the state of Miniestots, and having its principal place of business at Owatonna, in said state, the above named complainant, Creamery Package Manufacturing Company, has sold, assigned, transferred and conveyed and by these presents does sell, assign, cranster and convey to said Gwatonna Manufacturing Company affect its rights, title and interest in and to the costs to be taxted in the above entitled suit, against each defendants and in and to the judgment for costs to be entered in said cause.

The said Greamery Package Manufacturing Company hereby agree to cause to be entered in said suit, in its own name, such judgments for costs as may be permitted by law and by the practice of said court, and agrees further to make to said Owatoma Manufacturing Company such further instrument or instruments in writing as may be necessary or proper in order to vent in said Owatonna Manufacturing Company all its rights, title and interest in and to said costs and in and to said judgment.

In Testimony Whereof said Creamery Package Manufacturing Company has caused these presents to be executed by its President, attented by its Secretary and its corporate heal to be hereof affixed.

In presence of:

WALTER Me. BROOM R. W. PATRICK

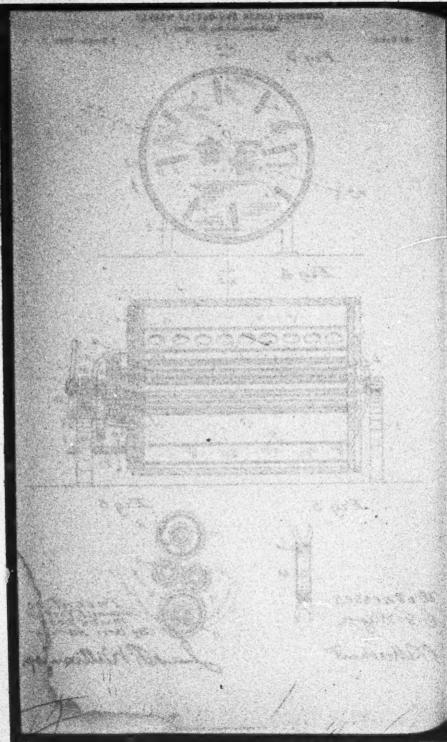
CREAMERY PACKAGE MANUFACTURING CO.,
By G. H. HIGGS,

Presidenta

C. J. PERRIS,

large danger con a managar at a condition as the end of

034,674 (Re Medel.) XE \$ 13 Inventors Bonni E Virtue Martin Dag Vitnesses 6. F. Kilgon Machant. 148.a.



# UNITED STATES PATENT OFFICE.

DENNIS R. VIRTUE AND MARTIN DEEG, OF OWATONNA, MINNESOTA.

#### COMBINED CHURN AND BUTTER-WORKER

SPECIFICATION forming part of Letters Patent No. 654.074, dated Orighn S. 1800. Application fled Nov 18, 1808, Suchl No. 681,120, (No mobil)

To nil whom it may concern:

Be it known that we, DEMMEE. VERTUR and
MARTIN DEEG, citizens of the United States,
residing at Owatonna, in the county of States
, and State of Minnesota, have invented certain new and useful Improvements in a Combined Churn and Butter-Worker; and we do
hereby declars the following to be a full, clear,
and state dissortation of the invantion, and hereby declars the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appearants to make and use the same.

Our invention relates to combined churms and butter-workers, and has for its object to provide an improved machine of this class.

To this end our invention consists of the soval devices and combinations of devices hereinafter described, and defined in the claim.

claims.

The invention is illustrated in the accompanying drawings, wherein like notations refer to like parts throughout theseveral views.

Figure I is swend elevation of our improved, machine with some parts removed. Pig. 3 is a longitudinal vertical section through the same on the line at a of Fig. 1.

Fig. 5 is a vertical cross-section on the line at a of Fig. 2.

Fig. 6 is a vertical cross-section on the line at a of Fig. 2. Fig. 4 is a section on the line at a of Fig. 2. Fig. 4 is a section on the line at a of Fig. 5 is a vertical plane. Fig. 5 is a section in the vertical plane. Fig. 5 is a to bring the working rouses one diversely the other in the vartical plane. Fig. 5 is a detail showing the shipper-fork for the roller-frive detached, and Fig. 6 is an end view of the roller-drive with the other parts removed. The drum 1 is mounted in any suitable way

The drum I is mounted in any suitable way to receive rotary motion from any suitable drive. As shown, the drum-heads are provided with trunnions piders 3, the trunnions of which rest in suitable bearing podestals 3, fixed to the floor or their supporting-base.

One of the trunnions—a. wit, the right-hand metaber, as shown—is hollow for a purpose which will later appear. The drum-head facing the hollow trunnion is shown as provided with an internal gear-wheel 4, which is suggested by a pinion 5 on the inner end of the driving-shaft 6. The driving-shaft 6 is supported by the adjacent pedestal 3 for the drum and ar outer end or shaft pedestal 7, as shown in Fig. 2. The said shaft 6 is projected with a friction-clutch driving-pulley 8, of the ordinary well-known construction, to

which motion is imparied by a belt from any suitable source.

The drum 1 is provided on its jutarior with a series of bestee-blades 9 and 10. Of these bestee-blades the members 9 are narrower than the members 10 are wider than the members 10 are wider than the members 20 and are imperfectate. The members 10 are wider than the members 2 and are imperfectate. The members 10 are wider than the members 2 and are provided with a series of botton 11, All of said bester-blades 9 and 10 are set redially inward from the shell of the drum, so as to leave elearance behind the same or, in other words, between the same and the occasive sylindrical surjace of the drum. The bester-blades are feoured at their opposite code to the drum-head. The perforated beater-blades are feoured at their opposite code to the drum-head. The perforated blades 10 are shown, while all the others are solid; but associated working rollers 13, journaled in the drum-heads. The journals of these rollers is actend ontward at one and through the drum-heads. The journals of their onlines and are provided at their outse each with pinions 14. The said journals of the rollers 13 pass outward through suitable stuffing-bore 15 to perforate 16 are formule as a common hub with pinions 17. It will be one-yealed to all the wheels 16 and 17 the "Got-ble gears.". These double gears are carried on stud-shafts 18, fixed to and projecting from the drum-head. As shown, the mid stud-shafts 18 are fixed to the casting of the annular gear on the drum. The stud-shafts 18 are fixed to the casting of the annular gear on the drum. The stud-shafts 18 are of a length to permit a silling movement flarround of the said double gears. The stud-shafts 18 and the double gears. The stud-shafts 18 and the double gears carried thereby are located diametrically opposite to cash other and equidiationally opposite to ca

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the balestal it. Under the section of a band sever \$1 it is obvious that the done goins want be shifted on their emporting of shall sever \$1 it is obvious that the done goins want be shifted on their emporting of shalls it. Throughout this shifting esseems, because \$1 it is obvious that the foller-nicosal \$1 the fettle having nefficient longit the section of the register want is need with the roller-nicosal \$1 the fettle having nefficient longit has been save in their outermost position, the plantament of the section \$2 the fettle having negative \$2 the leaders \$2 the l

into and out of notion is of course desirable in a machine of this kind, which is first used to chure the eream to superate the butter and ye then to work the butter. When the machine is used for churning, the working rollars are left in their idle position. When used to work the butter, they are thrown into their operative or driving position. Is will also be younderstood, of course, that the droup night receive its rotary motion in any other suitable way instead of by the means shown and

receive its receive incition in any other suitable way instead of by the means shown and described.

The churning and working actions of a machine of this class are of course well understood, and it is not desmed necessary to detail the same for the purposes of this case.

What we claim, and desire to secure by Lotters Patent of the United States, is as as

lotters rates of the United states, is as a follows:

1. In a combined churn and butter-worker, a rotary drum or shell having a pair of butter-working rollars provided with operating-gearing and located respectively at equidistant polats on coposite sides of the drum's axis and geared to turn together to work the butter between thom, is combination with a single fixed segmental rack adapted to be successively engaged by the operating-gearing of sech roller and from which said rollers are alterinately driven in reverse directions in auccession under the continuous rotation of the drum, whereby said working rollers reversing twice in each revolution of the ordrum will always turn toward each other at their upper or butter-working surfaces.

2. In a combined churn and butter-worker, the combination with a rotary drum having a pair of working rollers thereis, with their shaffrest ended, at one end, through the drumbead, of a reversing-drive for said rollers

shafts extended, at one end, through the drum-lead, of a reversing-drive for said rollers comprising intermeshed pinions on said pro-lecting shafts, a pair of gears carried by the drum, one sugaged by each of said pinions, and a fixed segmental rack adapted to Be en-raged by said gears, in ancosmion, under the rotary motion of the drum, substantially as described.

described.

3. In a combined churn and butter-warker, 115 the combination with a retary-drum having therein a pair of working rollers, with their shafts artended, at one end, through the drumhead, of a reversing-drive for said rollers comprising a pair of pinions, one on each of the aid rollershafts, a pair of guars carried by the drum one engaging each of eaid pinions, a fixed segmental rack adapted to be engaged, in succession, by said gears, under the rotary motion of the drum, and a shipper-head applied to said gears for shifting the same longthrite of their supporting-shafts to throw the same in and out of gear in respect to said rack, substantially as described.

4. The combination with the rotary drum 156 having a hollow trunnion, of the pair of work-

having a hollow trunnlon, of the pair of working rollers inside the drum having their shafts, at one ond, extended through the drum-head, the pair of plusime 14, one on each of said

police sharts, the pair of double genes mountal for rotary and sliding movement on the
stad-enacts lit projecting from the drum-bend,
as opposite stiles of the drum's axis, with the
large members 10 of said double genes constantly in mest one with such of said pinnons
11, the fixed segmental rack 25 adapted to be
segaged, in succession; by the small member 17 at said double genes, under the rotary
action of the drum, the shipper-head 10 augaging the hubs of said double genes and

having the control stant Maximuling universe through the hollow fruncions of the frum and the hand-leves #1 applied to gold stem all for cotporation, unbusistfully arthurshed In testimony whereof we aske the figure turns in presence of two witnesses.

DESCRIPTION AND PROPERTY.

linemes: E. W. Rickym, J. A. Sorsa.

Dykht & (1)

Cage 1484

No. 886,359.

Patented Nov. 12, 1901.

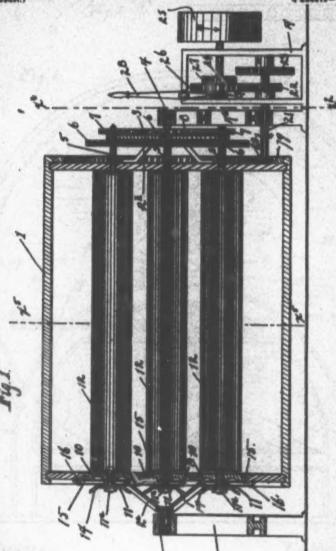
D. E. VIRTUE & G. A. HAREBORN.

CREAM TEMPERING, CHURWING, AND BUTTER WAKING MACHINE

(Application Stell Sec. 4, 190

(No Model.)

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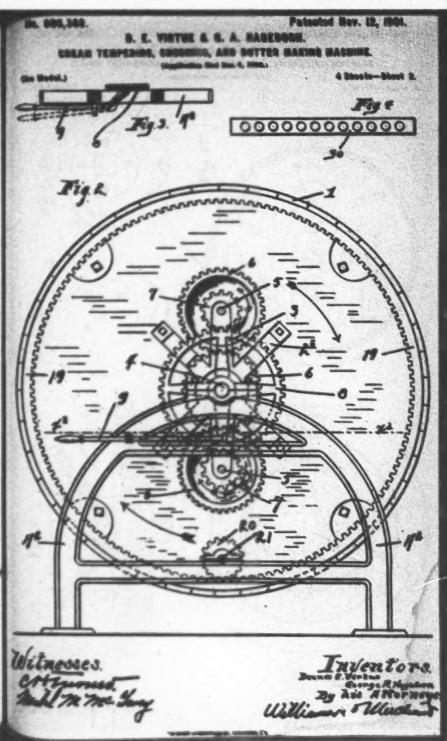


Witnesses. CHTURUF LLL MM Mc Young

Inventors

By Bie Attorneye

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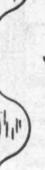
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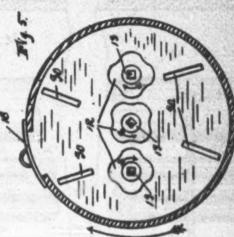
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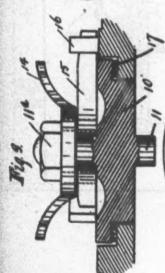
CREAR TEMPERING, CHOOMING, AND SUTTER MAKING MACHINE.

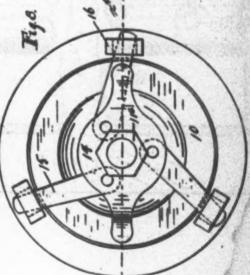
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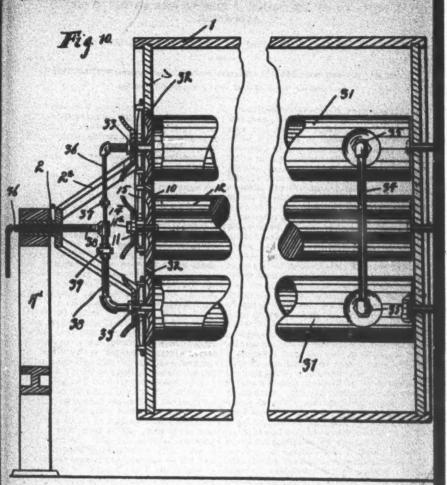
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Patented Nov. 12, 1981. No. 484,349.

TTER BAKING BACHINE.

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# UNITED STATES PATENT OFFICE

#### DENNIS E. VIRTUE AND GEORGE A. HAGEDORN, OF OWATOWNA, MINNESOTA.

CREAM-TEMPERING, CHURNING, AND BUTTER-MAKING MACHINE.

SPECIFICATION forming part of Letters Patent No. 885,369; dated Movember 13, 1901. Application fled December 4, 1900. Berial So. 88,681. (No model.)

To all whom is may concern:

Beitknown that we, DENNIS E. VIETUE and GEORGE A. HAGEDORN, citizens of the United States, residing at Owatonna, in the county of Steele and State of Minnesota, have invented certain new and useful Improvements in Cream - Tempering, Churning, and Butter-Working Machines; and we do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

Our invention has for its object to provide machine adapted to be interchangeably used is for tempering cream and for churning and working the butter and to permit the necessary changes for this purpose to be made without drawing off the cream.

To this and our invention consists of the novel devices and combinations of devices which will be hereinafter described, and defined in the claims.

The invention is illustrated in the accom-

The invention is illustrated in the accompanying drawings, wherein like notations respect to like parts throughout the acveral views. In said drawings, Figure 1 is a longitudinal vertical central section through the entire machine with the parts applied thereto for use in churning and working the butter. Fig. 2 is a view in section on the line x<sup>2</sup> x<sup>3</sup> of Fig. 1, but showing most of the parts of the machine in right end devasion with respect to Fig. 1. Fig. 3 is a detail in section on the line  $\pi^* x^*$  of Fig. 3 with most of the parts of the machine removed. Fig. 4 is a detail showing one of the paddies detached in plan. Fig. 5 is a vertical central cross-section on the line of Fig. 1. Figs. 6 and 7 are details in end elevation, showing opposite ends of one of the working rollers deteched. Fig. 8 is a view in end elevation, on an enlarged scale, showing one of the closures for the roller pasages or openings in one of the drumbeads. 9 is a cross-section on the line at at of Fig. 8; and Fig. 10 is a view in central longi-tudinal vertical section with some parts renoved and others broken away, showing the drum and the parts on the inside of the same s they appear when the water-circulating devices are applied thereto for tempering the

A suitable rotary shell 1, shown as of drum like form, is mounted to tern on a berisontal axis and receives rotary motion by means which will later be noted. The drum 1 is provided at one end with a spider ? pro vided with a hollow trunnion 2, mounts aultable bearings formed in a supporting pli low-block or fixed frame section A. At it opposite and the drum 1 is provided with a opposite and the dram I is provided with a spider P, which has fixed thereto a cross-har S, which in tern has fixed thereto a truncion 4, mounted in suitable bearings formed in a pillow-block or frame-section A. One of the drum-heads—to wit, the right-head head—as shown, has mounted therein three stub-shafts 5, which have fixed thereto three corresponding goars 6 of the same size. The contral member of the stub-shafts 5 has its axis coincident with the arts of the drame and the grace corresponding to the stub-shafts 5 has its axis coincident. with the axis of the dram, and the gear carried thereby is engaged by the other two member of said three gears. It follows that the shaft 5 are geared outside the drum by the gear whoels 6 toturn together wheneverone or of the members 6 receive retary motion. T side members of the three shafts 5 are radially equidistant from the axis of the drum as have fixed to their outer ends pinions 7, which are engaged by a relatively large gene-was, that is loosely mounted on the trumic of the dram. For distinction the loose wh of the drain.

S may be called the "controlling-gene."

hand-laver 9 is pivoted to the frame membe or pillow-block A" and is of such shape the its longrand may be through into the path of one of the spokes of the wheel 8 for presing the rotary motion of said wheel. The ing the rotary motion of data was all as intion of the hand-lever 2 to the someteoding wheel 5 is best shown in Figs. 2 and 2. Withis construction it is obvious that when the controlling wheel 3 is locked to the frame, as as to be held stationary, rotation of the drus will cause all of the shafts 5 to rotate on that own axes, while at the same time they are on ried around with the drum. On the of hand, if the controlling wheel 2 to left h or free to turn on the dram-trunnion 4 the whole train of gearing, made up of the part 6 to 8, inclusive, will turn with the drum, the wheel 8 turning on the trunnion 4 without cauging the shafts 5 or any thereof to turn on their own axes. The two onter shafts &

rum through eross-bar 3. The opposite head of the dram is provided with three openings or passages fitted with closures 10, having bearings in the form of journals 11 for co-squared on the same of journals 11 for co-squared on the same of wood and are provided on their ends with bearing-plates 13 are presently made of wood and are provided on their ends with bearing-plates 15. The bearing-plate 13 at one end of the roller is provided with a square sechet c to receive the square end of its supporting-shaft 5, and the bearing-plate 13 at the other end of the roller is provided with a round socket of to permit the plate 13 to fit switch journal-bearing 11 in the corresponding closures 10. These bearing-plates are best shown in Figs. 6 and 7. The closures 10 are made provided with a suitable looking device, which, as shown, consists of a lever 14, mountered on the outer end of the journal 11 and having pivoted thereto lever-arms 15, the outer ends of which have cam-surface faces and work through guide-keepers 10, fixed to the drambend. The laver 14 is tree for a limited as rotary motion on the journal 11, and the radial arms or levers 15 are pivoted to the lever 14 at such points that under the rotary motion on the journal 11, and the radial arms or levers 15 are pivoted to the lever 14 at such points that under the rotary motion on the lever 14 the arms 15 will be forced outward and through the keaners 16.

rur 14 at such points that under the rotary motion of the lever 14 the arms 15 will be forced outward and through the keapers 16, so and in virtue of the camming action, due to the inclined or wedge shaped faces of the levers 18, it follows that the closure 10 will be forced tightly to its seat and there held. The joint between the closure 10 and its seat in 35 the drumband is suitably packed by a proper gainst 17, of cork or other suitable material. A nut 12 holds lever 14 on journal 11. The openings subject to the closures 10 are of the proper size to freely pass the working rollows 12 and the water-circulating cans, which are substituted therefor, as will presently be

are substituted therefor, as will presently be mated. The drum 1 is also provided with the customery peripheral opening, fitted with a suitable cover or closure 18, for the introduction of the bream, removal of the butter, &c. One of the drumheads, praferably the one carrying the gears 6 and 7, is provided, as shown, with an annular gear-wheel 19. As shown, the gear-wheel 19 is an internal gear and is annuaved by a ninternal gear and is annuaved by a ninternal gear

carrying the gears 6 and 7, is provided, as shown, with an annular gear-wheel 19. As shown, the gear-wheel 18 is an internal gear and is ongaged by a pinion 20, fixed to a counter-shaft 31. The shaft 31 has its bearings in the frame podestal A\* and in a supplemental frame A, as shown in Fig. 1. The shaft 21 has fixed thereto a pair of gear-wheels 22 and 25, differing in size and number of teeth.

ings in the frame-pedestal A and in a supplemental frame A, as shown in Fig. 1. The shaft \$1 has fixed thereto a pair of gear-wheels \$2 and \$5, differing in size and number of teeth. A shaft \$4 is provided with a pulley \$5 for the application of a belt to impure motion thereto from any suitable source. The shaft \$4 is provided with a pair of gears \$6 and \$7, shown 50 as formed on a common bulk, which gears \$6 and \$7 also differ in size and number of teeth and are reversely related in point of position relative to each other as compared with the

grane 25 and 25 on the counter-shaft 21. The grane 26 and 27 are spitned to the shaft 24 with freedom for aliding motion thereon and are subject to a shipper-lover 28, pivoted to

the frame A and engaging with a suitable collar 30, formed on the hub of the gear 28. This construction affords a differential contange-speed drive for the rotary drum. As ahown in Fig. 1, the larger gear 36 of the main shaft 34 is in engagement with the smaller gear 25 on the counter-shaft 21; but it is obvious that by shifting the gears 36 and 37 the smaller member 37 on the main shaft 24 may be thrown into engagement with the larger member 23 on the counter-shaft 21. Hence the drum 1 may be rotated at two different speeds, the higher of which is adapted for use when churning and the lower of which is adapted for use when working the butter. The parts so far as described constitute a combined churn and butter-worker. When

churning, the controlling gear-wheel 3 is left & loose or free to turn on the drum-trunnion & Hence, as hitherto noted, the entire train of sars 6 to 8, inclusive, would be carrie around together under the rotation of the drum, but will not turn relative to each other, and hence the shafts 5 and the working rollers 12 will not turn on their own axes. When, however, it is desired to work the butter, the hand-lever 9 is thrown into a position to hold the controlling-wheel 8 and lock the same to se the frame, thereby preventing rotation there-of. When this is done, the pinions 7, fixed to the outer ends of the side members of the shafts 5, must travel around the stationary ear-wheel 8 under the rotary motion of the n drum, and hence the said pinions 7 will impart motion to the shafts o, which carry th same, and through the connected gears 6 will cause all of the working rollers 13 to turn to gether. The relative motions of the drum 1 and the working rollers 12 when the control-ling gear 8 is held stationary are indicated by the arrows in Fig. 5. The corresponding direction of rotation for the driving gear is in-cated by the arrows in Fig. 1. The drum 1 is rection of rotation for the driving-gear is in-cated by the arrows in Fig. 1. The drum 1 is is provided with suitable perforated paddies 30, fixed to the drumheads and extending lengthwise of the drum at a slight distance below the periphery of the drum and set on the proper angle to deliver the butter carried is upward thereby under the rotary motion of the drum to that pair of the working rollers 12 which are turning toward each other from above. Hence the butter will be caught and worked between the said pair of rollars. worked between the said pair of rollers.

Instead of two side rollers for cooperation

Instead of two side rollers for cooperation with the central roller it is obvious that three or more might be employed. So far as we know, we are the first to provide any construction affording a central roller having its axis to coincident with the axis of the drum and two or more side rollers, with all of said rollers geared outside of the drum or inside the drum on as to turns together on their own axes under the rotary motion of the drum, and also up the first to combine therswith a controlling gear adapted to be looked to the frame or to be permitted to turn Losely thereon at the will of the operator for causing the working

reliers either to receive rotary motion on their water-circulating devices can be detached sen uses while carried with the drum or to and removed and the side members of the carried with the drum without receiving a midependent rotary motion of their own. Directing attention to Fig. 10, which shows the tempering devices in working position, to numerals 31 represent a pair of water-ans adapted to be substituted for the side lateral members of the working rollers 12. The cans 31 are provided at one end with ds 32, which serve as the closures for the s in the drumbead, through which e rollers 12 and the caus 31 can be inserted nd removed. The can heads or closures 32 in shape exactly the same as the closures 10, which are applied when the rollers 13 are is use, and have the same identical locking devices as the closures 10. Instead of trunus, however, the can-heads 37 are provided with pipe-sections 33, extending outward through the closures. The closures 32 themsives serve as the bearings for the cans 31 at one end, and at the other ends the said ans 31 are provided with seats adapted to fit over the heads of the stub-shafts 5. mats in the cans 31 for receiving the heads the stub-shafts o are of circular form and brger than the square heads of said shafts, that if any rotary motion should by accident or otherwise be imparted to the shafts no motion would be communicated to the cans 31. The two cans 31 are connected by a detachable cross-pipe 34 and union-nuts 35. An inflow or supply pipe 36, made up of sep-arable sections connected by a right and left screw-threaded union 37, passes in through the discharge-section of an ontflow-pipe 38, which is also made up of two separable secions connected by corresponding union 30. The inflow-pipe 35 taps the pipe-section 33, anding to one of the case 31, and the outflowetion 38 iaps the pipe-section 83, projecting on the other can 31. The outflow-pipe secn is larger than the inflow-pipe, and the atter euters through the former, while the wmer passes outward through the hollow Francion 2 of the drum. With these cans and pipe connections applied as described it is obvious that hot or cold water may be cirmisted therethrough, as may be required, by tempering the event to bring the same to

o proper temperature before churning. With the construction herein efore deeribed it is obvious that means are afforded the interchangeable use at will of waterdremating devices to temper the cream and proper devices for charming and working is butter. It must be also obvious that the same from one to the other can be made Mhout drawing off the cream. For example, appose the tempering devices, together with central member of the working rollers, to are been applied first, as would naturally the case, or, in other words, that the parts mt used be thuse shown in Fig. 10. beream had been tempered by the circulathe of the hot or cold water, as required, the

working rollers be applied without drawing off the cream. To do this, the drum would be revolved until one of the water-cans 31 should be at its highest point. The drum might have been loaded with creen to a point slightly above the axis of the drum, which is about the usual load. The upper can would then be above the cream-level. The pipe 32 could then be detached from the two c the closure for the upper can be unlocked, the screw-union 87 manipulated to discouns the two sections of the inflow-pipe, and the upper can be removed. One of the side rollers 12 could then be inserted and applied to its proper shaft 5 at one end and the corresponding closure 10, with the bearing 11, be brought into proper position relative to the drumhead and the roller and the look made fast. This would bring one of the side roll-ers into working position and tightly close the opening through which the change had been made from the upper can to the corresponding roller. By then imparting a half-turn to the drum the other can would come turn to the drum the other can would come to the highest position and be above the cream-level, and a like substitution could be made, thereby bringing the other member of the side rollers into working position in lieu of the removed can. The parts would then all be as shown in Fig. 1 or as required for use in churning and working the butter. This provision for the interchangeable use of cream-tempering devices and proper deof cream-tempering devices and proper de-vices for churning and for working the but-ter without drawing off the cream from the drum is a great convenience and effects a large economy in merchant - creameries. Apart from this interchangeable feature of the two classes of devices, the detachable feature for the working rollers and all the parts employed within the drum is an important thing in itself for the sake of cleanliness. Absolute cleanliness is essential for securing the best product in machines of this class. I unsmuch as the working rollers can all be readily detached and removed from the drum, every-thing can be kept thoroughly clean.

By actual hange we have demonstrated the officiency of the improvements herein dis-

closed for the purposes had in view.
It will of course be understood that medi-Sentions might be employed without departing from the spirit of our invention.

What we claim, and desire to moure by Letters Patent of the United States, is as follows:

1. A rotary drum or shell mounted to turn on a horizontal axis and provided with stubshafts, in one drumbend, goared, outside the drum, to turn together, and bearings in the other drumhead, for cooperation with said atub-shafts, to interchangeably receive and support detachable rollers and water-circulating devices, substantially as and for the purposes set forth.

2. A retary dram or shell mounted to turn

or a horsement extra provided with stall-should be decided the decided to the control of the con

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stantially as described.

the combination with a retary shell or draw, of a central roller having its axis or decident with the axis of the farm, two or more aide rollers redisilly equidients from the seatest roller, with said three rollers general to term together by gener carried with the draw, a controlling-pear, looks on the fixed frame and annuaring phinons fixed to the projecting edge of the side-roller shafts, and means, operative at will, for powersting the retation of said controlling-pear, substantially as described.

an combination with your class of the combination with the combination of the combination

agaidminate from and combrait relies, with said three rolliers general to turn together by good windle the from and corrected the correct to controlling good loos on the fixed from and on suring philosom on the projecting sects of said adde-roller matte, and a hand derive for locking said controlling good to the chaft, at vill, substantially as and for the purposessed for the

c. In a combined churn and butter-works, the combination with a rotary drive or shell, having roller passages or openings in one head thereof flitted with closures, of a central roller and two or more side rollers within the dress. Astachably secured thereis and removable through said openings is the drushead, and stab-shafts mounted in the opposite drumhead for segagement with said rollers, which stub-shafts are genred outside the drust to turn together, a controlling-gene loose on the fixed frame and engaging pinious on the projecting ends of the side-roller shafts and a hand device ongageable with said genr for preventing the rotation thereof, at will, substantially as described.

7. In a combined churn and butter-worker, the combination with a rotary drum or shell, of detechable working rollers, stab-chafts in one drumheed and roller-passages in the opposite drumheed, fitted with cloaness having bearings for cobperation with each club chafts, to support said rollers, and permit the removal and insertion of the same through said.

In testimony whereof we affix our signa- ; tures in presence of two witnesses.

DENNIS E. VIRTUE. GEORGE A. HAGEDORN.

Vitágoss: H. R. Johnson, Gro. A. Newalt. Es. 861,561.

PATESTED JULY 80, 1907.

D. E. VIRTUE. COMBINED CHURN AND SUTTER WORKER. APPLICATION PILED MAY W., 1807.

ANDRO-SERRY

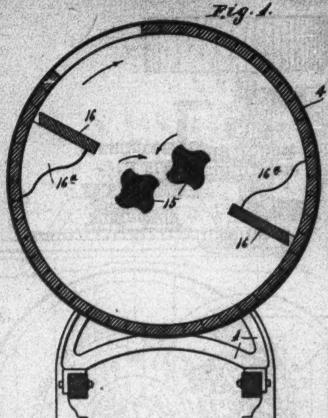






Fig. 2.

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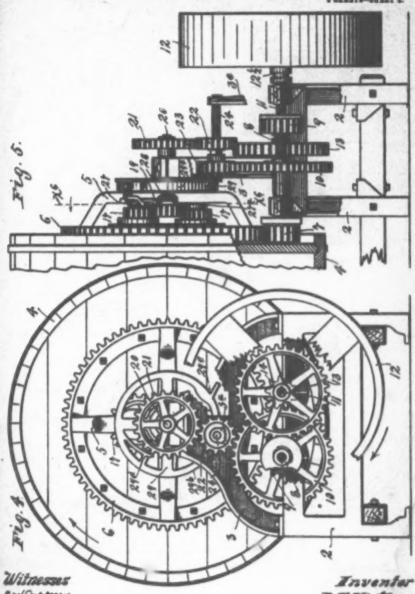
PATENTED JULY 30, 1907.

### D. B. VIRTUE.

COMBINED CHURN AND BUTTER WORKER.

APPLICATION PILED MAY 81, 1907.

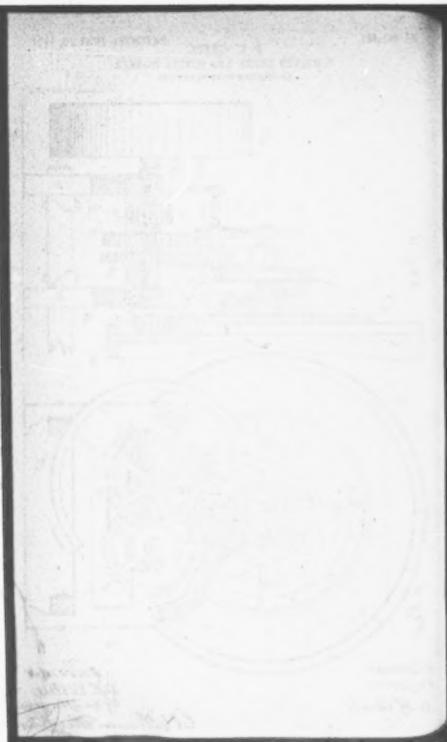
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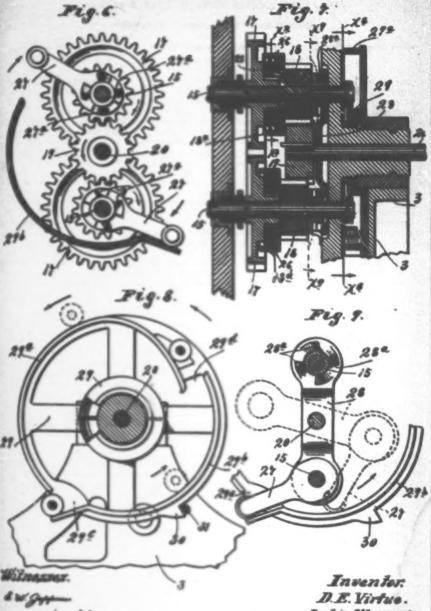
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APPLIESTING PILES HAT IN, 1907.



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# UNITED STATES PATENT OFFICE.

DENNIS E. VIRTUE, OF OWATONNA, MINNESOTA.

#### COMBINED CHURN AND BUTTER-WORKER.

No. 061,561.

Specification of Letters Palent.

Patented July 30, 1907.

Application fied May 27, 1907. Serial No. 276,896.

To all whom it may concern:

Be it known that I, DEFINE E. VIETUR, a citizen of the United States, residing at Owatoans, in the county of Success and State of Minnesota, have invented certain 5 new and unchal Improvements in a Comblined Churn and Butter-Worker; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the artts which it appertains to make and use the same.

My invention relates to combined churus and butterworkers, and has for its object to provide an efficient

machine of this class.

To this end, it consists of the novel devices and combinations of devices hereinafter described and 18 painted out in the claims.

In some of its general features, my machine herein disclosed is similar to the machine disclosed and claimed in the prior U. S. patent issued to myself and M. Deeg, of date October 3rd, 1898, No. 634,074, but 26 my present machine differs from said prior machine in respect to many important features herein disclosed and glaimed.

My improved mathine is illustrated in the accomparying drawings, wherein like notations indicate like

25 parts throughout the several views.

Referring to the drawings, Figure 1 is a vertical cross saction through the entire machine, with some parts removed. Figs. 2 and 3 are details in section on the line at at of Fig. 7, illustrating parts of the friction 30 clutches used as elements in the roller drive. Fig. 4 is a view chiefly in elevation, but with some parts in settion, others broken away, and some parts removed, showing the geared or front end of the machine. Fig. & in a view chiefly in side elevation, with some parts 35 orohah away and others removed, showing the mme or guased end of the machine. Fig. 6 is a detail, in vertical section, on the line at at of Fig. 5. Fig. 7 is a view in section, in a plane through the axis of the drum said ages of the two rollers, with some parts broken away, with the roller shafts standing in a vertical line. Fig. 8 is a view in section on the line x x of Fig. 7; and Fig. 9 is a detail, partly in section and pantly in elevation, on the line zo xo of Fig. 7, with some parts broken away and others removed.

In a mitable supporting frame is mounted a rotary dram 4. Of the parts of mid frame it is sufficient, for the purposes of this case, to note the rear end leg or pedestal 1, the front end extension or roctangular pertism 3, and the front end pedestal 3 and bearing bracket 19 3° heath boited fast to said extension 3. The dram 4, at its rear end, has a mitable transion, not shown, fixed to the head of the dram, and mitably journaled in the rear end frame leg or pedestal 1. At it front end, the dram 4 is provided with a trunsion spide 5 is the trension of which is hollow and is neuraled in the

front end pedestal 3. The spider b has cast integral therewith an external ring gear 6, and this combined gear and spider casting is belted fast to the front bend of the dram. With the external gear 6 engages a pinion 7 fixed to the inner end of counter-shaft 8 which is mounted in the framework 2. It is obvious, that when the counter-shaft 8 is turned, estary motion will be imparted to the dram 4 by means of the pinion 7 and the external ring gear 6.

A two speed drive is provided for the shaft 8 so as to turn the drum at a higher speed for churning and a lower speed for working the butter. For this purpose, mid counter-shaft 8 has fixed therete an outer or small goar wheel 9 and an inner or large goar wheel 16. A main driving shaft 11 is journaled in the framework 2, parallel with the counter-shaft 8, and is provided at its outer end with a driving pulley or band wheel 12 which, in practice, is equipped with a medially expar sible friction clutch 12), the hub of which only is shown, for gripping the wheel to the shaft 11. On said shaft 11 is mounted a double gear casting, the outer or larger member of which is marked 13 and the inner or smaller member of which is marked 14. This casting, with the gears 13 and 14, is splined to the shaft 11, so as to be capable of a sliding movement lengthwise thereof to change from the high to the low speed, for the drum, whenever so desired. The double gene casting is shifted by a suitable shipper fork, not shown. When mid double gear casting is shifted to its outsemost position, its large gear wheel 13 will engage with the small goar 9 on the counter-chaft 8, and thue afford the high speed, the parts being shown in this position. in Fig. 4, and when said double gear casting is shifted to its innermost porition, its small member 14 will engage with the large gear wheel 10 on the counter-shaft S and afford the low speed, the parts being shown in this position in Fig. 5.

In the drum 4 are mounted a pair of fluted rollers 15. the axes of the respective rollers being parallel with the axis of the drum, on opposite sides thereof and substantielly equi-distant therefrom. The shafts of the rollers 15, at the rear and of the dram, are journaled in the bead of the drum, but, at the front or geared end of the drum, the roller shafts extend outward through suitably packed joints and are journaled in one of the crose arms of the trunuion spider 5. A pair of shelves 16 are fixed to the drum, parallel with the rollers, opposite to each other and in such position as to have their working faces substantially in a plane intersecting the axis of the drum at an angle to a plane through the axes of the two rollors, as clearly shown in Fig. 1 of the drawings. The shelves 16 are fixed to the drum in any suitable way, such as being made but at their ends to the head of the drum and supported at or near their centers by brackets 100 fixed to the walls of

The chairm II up probably to set as to a opera between the man and the well of OTO A BE

The draw 4 is deliver considerably, in a comment di-mine. The pulling day or deligen that they always piven 16 in electronics, so as to work the ter through twice in each revolution of the dram, to relieu 15 must be reyused turico in each revelution of the drust. As important feature of my inves-tion barels disclosed and chained, rotons to this re-quiring miles drives, to means for predictely revening on of the relies twice in each revolution of draw, while the draw town consequently in a cou-nt direction. The masses for this purpose will now

in 16 are general to be driven one from th ther, and this driving relation shifts from one to the ther today in such revolution of the dryes. As shown, to of the relies is here fixed therein a pair of ing green 17; and on the mid pair of shade, he genes 17, are leasnly unconted, with miles for diding motion thereto, a corresponding for the philoson Mr. These printers Mr are compared by against site of a small par fixed to the inner and of a control delving that II. The develop shall 20 pures at through the hallow pudgeon of the from experi-ing upder 5, and has in bearing therein. At its control, the shall II has fixed thereto a relatively loops sed 21. On a centionery shalt 24 fixed to the to 3 and 3" of the feanework, at the general and of alon, is lovely mounted a double peer fasting. the center member of which is marked 22 and the inner member 22, and which casting, in practice, is subject er of which is marked 22 and the inner to a shipper fielt for sliding the came longitudes of the supporting shalt 24. When said double gase casting is in its innocesset position, its inner genr 28 will be in Signment with the large wheel 10 on the counter of 8 and in outer member 25 will be in organism with the gene 21 on the roller driving shaft 30; or, as the parts are shown in Fig. 5; or otherwise stated, this substantish is made to exist at the time when the draw is helpy driven at its slow speed. By disting the doublir casting, on the sheft 5t to its outermost posttion, its gene M will be theren out of mask in respect e 16, and its gear 22 will be thrown set of to the pr much with the roller driving goar 21; and this relationin made to exist at the time when the drum is be-ng delven at its list speed, so desired in the churcing

From the forgoing, it is obvious that the roller driving shaft 30, when in metion, is driven in a constant direction appeals to the motion of the dram, and that its inner end gair 10 will turn the lesse pinions 10 of puller shafe, in essence directions but opposite to a direction of said shaft 20, on can readily be underand from an impaction of Fig. 7. It is obvious also, at II the piplets 18 can be absonately clutched to e emperious gene whouls 17 fixed to the relier shalls, a disjoint political interest the two reliess will be al-

security difficul from our to the other, with the sec tion of the rollers on thick own axes will be recess while the drum configura to revolve in a constant direction. The means for this purpose, will now be roted.

mosting pair of multiple disk friction contributions become in Fig. 7, 3 and 7. The inner bule of the pie-三世子子 计划 and 36 are intercalasted with respect to such other, and as the smaller disks 25 engage with the leabs of the gest wheels 17, and the larger members 24 engage with the ribs 15° of the housing finance 15° on the hubs of the plations 18, it, of course, follows that, when one of the clusches is in its cloud position and the other is in its open position, motion will be imparted to both relies 16 from the one thereof having thereon the clutch it which is in its closed position at the tier

On the roller made, directly outward of the pinions

18, are mounted a sale of roller-equipped can lever 27 with mined can high 27° on their outer hub faces, as most clearly shown in Figs. 6 and 9. Directly outward of the hubs of the cata levers 27, is located a reaction her 36 with raised cam surfaces 30° on the inner faces of its opposite eads for cooperation with the raise cam authors 27" on the hube of the cam levers \$7: The water made of the reaction, bar 28 are provided with openings to fit over and ride upon the hube of the cam levers 27, and the ber 28 is also provided with a central passage enabling is to be slipped over the central shalt 26, as best shown in Fig. 7. With this stated relation of the parts 27 and 28, it is obvious that angular motion of the case levers 27 will slide the pinious 18 lengthwise of the roller shafts so as to close the clutches by clamping together the friction disks 26 and 26. To control these angular movements of the cam levers 27, a case casting 29 is provided which, as shown, is mounted on the trunnion of the dram supporting spider 5, directly inward of the frame podestal 3, at the geared and of the mechino, as best shown in Figs. 4, 5, 7 and 8. This cam casting 30 is provided with a peripheral case flange or track made in two sections, marked 20° and 130 20°, staggered in respect to each other and so related as to have their main portions in ones of different circles, and also so as to afford an inlet gap 20" and an outlet gap 20° for the rollow of the case levers 27. Th go Il" is so shaped as to have a considerable Ili section thereof extending in the arc of a true circle but section thereof extending in the state portion adjacent to have one portion thereof, to wis, that portion adjacent to the outlet map 30% bent inward or formed access

and 9. The levess 27 are so shaped that their relies equipped ends will much outward beyond the cross burs of the IN

to the arc of its main portion. The cam flange 20

circle which is concentric to the main portion of the

cam flange 20° but struck on a smaller radius, so that

has its main portion formed in the erc of a tree 19

the inner face or surface is staggered inward toward the axis of the dram, se compared with the outer, see of the man flunge 20°; and the roller entrance and of the 18 finege 20° turns outward tangential to the arc of its main or holy pertine all to most clearly shown in Figs. 8

mlon spider 5 and engage with the cam flances 39 d 10" of the cam casting 20, as can be best seen in Fig. 5, 8 and 9. The cam casting 20 is provided with a peripheral shoulder or lug 30 adapted to cagage with the pin 31 removably scated in the pedestal 3, as shown in Fig. 8, for holding the cam casting 29 in a stationary position, at the time when so desired, to-wit, when said eam is to he called into action for cooperation with the cam levers 27 to reverse the rollers twice, in each reve-16 Jution of the drum. The time, of course, during which this continues is while the machine is being used for working the batter. The pin 31 is withdrawn from its seat before the churning action begine; and, in the churning action, the cam casting 29 travels with the 18 drum, being carried around therewith by the cam levers 27. With the structure of the cam casting 29 and the relationship thereof to the cam levers 27 distinesly in mind, the operation of these parts can readily be understood. Assume that all the parts are in position for working

the butter. The cam casting 29 will then be hold in a stationary position by the pin 31, or as shown in Fig. 8. Then, under the rotation of the drum, the rollers of the cam levers will travel around the cam 26 casting 29, bearing against the outer face of the cam fange 29 until the gap 29 is reached, whereupon, the roller will be intercepted by the tangential projection of the cam flange 29th and be shifted inward so as to come into engagement with the inner face of 20 the cam flange 29°, thus producing an angular movement of that particular cam lever and thereby forcing the cooperating clutch into its closed position; and this relationship will be maintained until that particalar roller reaches the gap 294, whereupon, the inturned 25 or occentric portion of the care fiange 29° will source with the inner surface of mid . Her and thereby impart angular motion to the cam lever 27, in an outward or reverse direction, thus throwing that particular clutch into its open position. At the same time that one cam lever is thus thrown outward by the cocentric portion of the cam 29°, the roller of the other cam lever 27 will be entering the gap 39°, and be forced inward, thereby throwing its cooperating clutch into the closed position. The cam flange 200 is of such 45 length as to hold the cam lover 27 passing over the inner face thereof, in its innermost or clutch closing position for nearly but not quite a half revolution of the drum; the other cam flange 29° is of such length as to hold the cam lever passing over the outer face thereof, in its outermost or clutch opening position for a little more than a half revolution of the drum, The sam flange 206 occupies such a position, when the cam casting 29 is held stationary by the pin 31, that

the lowest member of the two cam levers 27 magazes with the soid cam flange 20°. It follows, that the lowest roller, on the rising-side of the drum, is always the driving member; and, hence, it further follows that the upper or butter receiving faces of the two rollers 15 will always turn toward each other, on the old in the rising side of the drum, as is required to receive the butter from the shelf 16, on the rising side of the drum, and work the same therethrough.

The devices, hereinbefore described, for securing the revening drive for the rollers, it will be seen, from the halove meterments, are of such a character as to make

the action positive where required and yielding where required, and so that the revenue will dalor place, as the proper times, in a reliable manner, without any shock or jur to the comparating parts. Otherwise and briefly stated, the self-ooth running of the moving parts of the reaching action of the million the multiple disk friction clutches, shown and described for codpension with the gene 17 and the pinions 28, are of a standard type and are desirable for such a purpose, but it must be understood that any other suitable form of clutch mentions might be employed.

Having regard to the effect on the cream and the butter, it will, of course, be obvious that the requirite concussion of the cream for the churning action is secured by the shelves 16. The presence of the relies 15 is of no assistance in the churning action. The churn would probably work faster in the churnian action, if the rollers were not present. After the cream has been churned, the buttermilk drawn off, and the butter washed and the water drawn off, the butter will be in the bottom of the drum in a granuhe form. The salt is then applied and the drum is started up under its slow motion. The shelf 16, on the rising side of the dram, will then engage with the butter and cooperate with the belly of the drum, in advance of the shelf, to carry up the butter to such a height that the upper portion of the more of butter will be overcome by gravity and will drop off the mass and roll down along the side of the same until caught by the rollers 15, whereupon it will be worked therethrough and dropped into the bottom of the drum. All the butter carried up by a given shelf will be worked through the rollers and dropped into the bottom of the drum before the rollers are reversed. At this time, the shelf which had been carrying up the butter will be slightly beyond its vertical position. Under the continued movement of the drum, the rollors are reversed under the cooperative action of the cam custing 29 and the care levers 27, as hitherto noted, and will thereafter turn in the right direction for cooperation with the other shelf which will now be on the rising side of the drum. This second shelf then engages with the butter and in cooperation with the belly of the drum carries same up until, under the action of gravity, the butter is again delivered to the rollers and worked therethrough and again dropped into the bottom of the drum. In this way, the actions are repeated, working the butter through twice, in each revolution of the drum, and in substantially the reverse order in point of time, thus completely turning over the mass of butter and thoroughly incorporating the salt therewith and removing the moisture therefrom, in a minimum of time.

The efficiency of this machine herein disclosed and described has been fully demonstrated by actual ungesthereof.

What I claim is:--

1. The combination with a retary dram and a pair of rollors thereas goared to be driven one from the other, of a reversing drive for said rollors which drive includes a pair of constantly driven clutch members, and means for summatically forcing and two clutch members altocantity, into clutch closing and two clutch members altocantity, into clutch closing and clutch opening positions in each half revolution of the drum, ashatanfully as described.

2. The combination with a retary drum and a pair of

reliese thereto general to be driven one from the other, and a reventur drive for said relies which drive lockeds a pair of constantly driven clutch members loose on their responts and truvelling with the drum, and means for animantically forcing said two clutch members afterantoly his clutch cluting and clutch opening positions with each half revenitation of the drum, substantially so described. 2. The conditables with a retary drum and means for

A The condisination with a retary dram and means for driving the came is a constant direction under a continucian motion, a pair of relieva in said dram genred to be detwen one from the other, and a reversing drive for said resilvent including a pair of constantly driven clutch monen ionse on their supports and traveling with the dram, and means for automatically furcing said two clutches into driving and idle positions alternately in reverse order, in such half, revolution of the drum, substantially as de-

4. The combination with a retary drum and a pair of nellews therein having intermening genra fixed to their projective starfia, and a revoresing drive for said relievs including a pair of constantly driven clutch members loose one us each of neit roller chafts, a pair of can levers angularly insertite one on each of aid shafts to force said which members into clutch closing positions, and a cam online the constant of the clutch opening positions for substantially a half revolution of the drum, substantially as

5. The combination with a retary drum, of a pair of rotters therein having gener fixed to their respective shafts and counging with seeds other, and a reversing drive fee

unid reliters which drive includes a pair of pinions base on the roller shafts and movable lengthwise thereof, dusin surfaces between said relies geard and said beens pinions, a contral driving shaft with pinions gined therete and engaging opposite sides of said loose pinions, a pair of can levers amplainty movable on said loose pinions to be said to see pinions tube clusted closing positions, and a case adopted to be held in a stationary position and provided with can surfaces so chaped and dispessed as to hold one of said dilovers in circle closing position and the other is clusted opening position for emiscantialty a half reveiution of the drum, substantialty as described.

dram, anatantinity to described.

6. In a machine for churulag or working butter, the combination with a redary drum, of a pair of rollers of therein having their ansa respectively on opposite sides of the axis of the dram and substantially equi-distant therefroe, means for the continuous rotation of the drum in a common direction, means for revening the relation of the rollers twice in each revolution of the drum and at times when the mass of said rollers are substantially in a vertical line, and a pair of shelves fixed to the drum supposite to each other and having their from substantially in a plane lateracting the axis of the drum at an angle to a plane through the axes of the reliefs, substantially as de- in the plane interacting the axis of the drum at an angle to a plane through the axes of the reliefs, substantially as de- in the plane in the

nertines.

In thetimony whereof I ask my signature in presence of two witnesses.

DENNIS E. VIRTUE.

Vitnesses:

H. D. KILGORS, F. D. MERCHANT.

148t

STATE OF ILLINOIS,

County of Cook.

88.

On this oth day of January, 1908, before me, a Notary Public, in and for the county and state aforesaid, personally appeared Charles H. Higgs, president of the Creamery Package Manufacturing Company, who being by me first duly sworn, doth depose and say that he is the president of the Creamery Package Manufacturing Company and that the foregoing instrument was executed on behalf of the Creamery Package Manufacturing Company by authority of its Board of Directors, and said Charles H. Higgs, acknowledged said instrument to be the free act and deed of said Creamery Package Manufacturing Company.

R. W. PATRICK, Notary Public, Cook County, Illinois.

UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA, FIRST DIVISION.

D. E. VIRTUE and THE OWATONNA FANNING MILL COMPANY,

Plaintiffs.

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THE CREAMERY PACKAGE MANUFACTURING COMPANY, The Owatonna Manufacturing Company, Thomas J. Howe, Frank La Bare and Charles H. Higgs,

Defendants.

SEPARATE ANSWER OF DEFENDANT THE CREAMERY PACKAGE MANUFACTURING COMPANY TO AMENDED AND SUPPLEMENTAL COMPLAINT AS AMENDED JANUARY 5, 1909.

T.

Defendant, The Creamery Package Manufacturing Company, for its answer to the amended and supplemental complaint, as amended January 5, 1909.

(1) Admits the allegations of paragraph "1" of said complaint,

except that it denies that it has or ever had any manufacturing plant at Mason City, Iowa, or at Lexington, Missouri.

- (2) Admits the allegations of paragraphs "2", "3", "4", "5", "6" and "7", and that the various corporations and the partnership theretofore in said complaint named; made; executed and delivered the certain contract in writing of which exhibit "A" of said complaint is a copy, except that paragraph "20" of said Exhibit "A" was stricken out and eliminated from said contract before the same was executed or delivered.
- (3) Admits that before February 24th, 1898, said corporations and the partnership transported from one state of the United States to various others and sold at retail, in the usual course of business, a portion of their goods and merchandise, and that during all the time in the said complaint mentioned many hundreds of thousands of dollars worth of such goods and merchandise were annually sold, shipped and distributed from one of the United States to others thereof.
- (4) Admits the allegations of paragraph "II" of said complaint, and admits that the terms and conditions of the contract Exhibit "A" were, after its execution, duly performed and carried out by the parties thereto as provided in said contract, except that this defendant did not issue or distribute the gold bonds provided for in paragraphs "I3" and "19" of said Exhibit "A".
- (5) Admits/that since the execution of said contract Exhibit "A" it has managed operated and conducted one branch of its business at Chicago, Illinois, under its own name; one branch of its business at Minneapolis, Minnesota, under its own name; one branch of its business at St. Paul, Minnesota, under the name of "Fargo Creamery Supply House"; one branch of its business at Lake Mills, Wisconsin, under the name of the "Fargo Creamery Supply House"; one branch of its business at Fort Atkinson, Wisconsin, under the name of "Cornish, Curtis & Gueene Manufacturing Company"; and until about September, 1903, one branch of its business in the City of Chicago, Illinois, under the name of the "A. H. Barber Manufacturing Company"; and alleges that under the provisions of said contract Exhibit "A" it had the right to manage, operate and conduct each of said branches of its business at the said places, respectively, under the said names respectively.
  - (6) Admits that Exhibit "A-1", Exhibit "A-2" and Exhibit "A-3", referred to in said complaint, were executed and delivered by the parties purporting to execute them, respectively, and were duly performed by the parties thereto.
    - (7) Admits the allegations of paragraph "18", and admits that

the contracts referred to in said complaint as Exhibit "B-1", Exhibit "B-2", Exhibit "B-3", Exhibit "B-4", Exhibit "B-5", Exhibit "B-6", Exhibit "B-6", Exhibit "B-7", Exhibit "B-8", Exhibit "B-9" and Exhibit "B-11", were executed and delivered by the parties purporting to execute them, and were duly performed by the parties thereto, and admits that the assignment, Exhibit "B-10", was executed and delivered to the Owatonna Manufacturing Company, in accordance with the provisions of Exhibit "B-9".

- (8) Admits and alleges that on January 22nd, 1900, the contract Exhibit "C" of said complaint was made, executed and delivered at Chicago, Illinois, by the parties named therein, including one Martin Deeg; denies the allegations of paragraph "24".
- (9) Alleges that in pursuance of the terms of said contract, Exhibit "C", the said Deeg, one of the parties to said contract, proceeded shortly after January 22nd, 1900, to make the patterns mentioned in said contract; that for that purpose the Cornish, Curtis & Greene Manufacturing Company (hereinafter called "the Cornish Company") gave him a bench or place of work in its factory, free of rent, and this defendant and the Cornish Company paid him wages at the rate of \$2.25 per day for the days used by him on said patterns from some time in January, 1900, to some time in April, 1900; that this defendant and the Cornish Company also furnished to said Deeg the material, labor and machine work needed for the construction of said patterns; that after said patterns were completed this defendant and the Cornish Company completed a test churn, in accordance with said patterns, and in order to test the said churn, put the same in actual operation in a creamery at Ft. Atkinson, Wisconsin, during the month of May, 1900; that said test churn, on being operated in said creamery, developed weak parts and broke down, and that corrections in the construction of said churn and in the patterns therefor, amounting to a complete remodeling of said churn and pattern, were needed in order to overcome the weakness shown by said test;) that this defendant and the Cornish Company notified said Virtue and Deeg of the making of said test and of the results thereof, as hereinbefore stated, and thereupon said Virtue and Deeg agreed with this defendant and the Cornish Company to further test the said churn and correct said weak parts. and make said corrections in the construction of said churn and said patterns, to the end that if said weak parts could be corrected and said corrections in the construction could be made, this defendant and the Cornish Company might proceed to manufacture churns and butterworkers for the market under said patent in said Exhibit "C" mentioned.
  - (10) Alleges that said Virtue and said Deeg made further tests

of said charm and attempted to correct said weak parts, and to make said corrections in the construction of said charm and in the patterns therefore, but were entirely upsuccessful in such attempts, and were wholly unable to correct said weak parts or to make said corrections in the construction of said charm or in the patterns therefor; that thereupon and before May, 1901, the parties to said contract Exhibit "C" mutually abandoned and rescinded the same, and each of the parties released and discharged the other from all obligations thereunder; that thereafter, until about October, 1907, neither said Virtue nor said Deeg made any claims or demand of any kind against this defendant or the Cornish Company under said contract, or claimed or asserted any right of any kind thereunder, except only that said Virtue, about June 10th, 1907, demanded of this defendant, through his attorneys in this action, compensation under said contract for the use of said patents during the three years specified in said contract.

- (11) Admits the allegations of paragraphs "25", "26" and "27".
- (12) Admits the allegations of paragraph "29", except the words, "and still pending in the said United States Circuit Court"; and admits, the allegations of paragraph "30" of said complaint; and alleges that said action in said paragraphs "29" and "30" mentioned was pending until January 26th, 1907, on which day a final decree was made, rendered and entered in said Circuit Court in favor of this defendant (complainant therein), and against these plaintiffs (defendants therein), by which final decree of said action was duly terminated in favor of the complainant therein and against the defendants therein; and that a copy of said final decree is hereto attached, marked Exhibit "1", and made a part hereof; that the defendants in said action duly appealed from said decree to the Circuit Court of Appeals of the United States for the Eighth Circuit, and that thereafter, on January 9th, 1908, their said appeal was dismissed by the said Circuit Court of Appeals for want of prosecution, and that said decree stands as the final decree in said action, unappealed from and unreversed.
- (13) Avers that it has not knowledge or information sufficient to form a belief as to the allegations of paragraph "28" of said complaint following the words "at all times well knew" to the end of said paragraph, or as to the allegations of paragraph "31" of said complaint following the words "at all times well knew" to the end of said paragraph, except that it admits that the plaintiffs herein procured witnesses in each of said actions, employed the same counsel in each thereof, and prepared eachs of said actions for trial, and tried each thereof.
- (14) Admits that on January 9th, 1908, this defendant made, executed and delivered to said Owatonna Manufacturing Company the assignment of costs, whereof a copy is attached to said complaint as

Exhibit "E-4", and that on January 27th, 1908, a copy of said Exhibit "E-4" was handed to and served upon the plaintiffs herein.

- (15) Avers that it has not knowledge or information sufficient to form a belief as to the allegations in paragraph "34" of said complaint, to and including the words "Iows and South Dakota", and from the words "that at the time of the commencement", to and including the words "at a large profit to said Fanning Mill Company and D. E. Virtue", and that it has not knowledge or information sufficient to form a belief as to the allegations in paragraph "35" of said complaint, except that detendant denies that plaintiff has ever been in any way deprived of any use or benefit of any of the property in said paragraph "35" mentioned, by any act of this defendant, and denies that the value of any of the property described in said paragraph "35" or the value of the use of any of the same, has been in any way or in any amount decreased by any act of this defendant.
- (16) Avers that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "38" of said complaint, except that it admits that the United States, in due form of law, issued to plaintiff Virtue and to said Martin Deeg certain letters patent, of which Exhibit "F-1" is a copy.
- (17) Avers that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "41" of said complaint, except that it admits that the United States, in due form of law, issued to plaintiff Virtue and to one C. A. Hagedorn certain letters patent, of which Exhibit "F-2" is a copy; and alleges that by the decree, Exhibit "1" of this answer, it was determined, and it is and always has been the truth, that the invention described and claimed in said patent, of which Exhibit "F-2" is a copy, is and always has been an infringement of certain patents owned by this defendant, which patents are fully described in Exhibit "E-1" of said complaint and in said decree, and that said patent, of which Exhibit "F-2" is a copy, is and always has been utterly void, invalid and of no force or effect.
- (18) Avers that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "44" of said complaint, except that it admits that the United States, in due form of law, issued to said plaintiff Virtue certain letters patent, of which Exhibit "F-3" of said complaint is a copy.
- (19) Admits that before February, 1898, and thereafter, A. J. Cushman & Company was a corporation, duly organized and existing under and by virtue of the laws of the state of Iowa, with a store and place of business at Waterloo, Iowa, at which place the last named company was engaged in the business of selling, shipping and distribu-

ting into the states of lows. Minnesots and other states of the United States, churus, butter-making machines, dairy and creamery supplies, and other merchandise, and that some time before February, 1898, this defendant purchased the business and property of said company for about the sum of Societo, which was then the actual value thereof.

(20) Admits that time February 24th, 1808, it has purchased certain property of the following concerns:—Cook & Reed, of Des Moines, Iowa; Fremont Butter Tub Company, of Rock Island, Iowa; Stoddard Manufacturing Company, of Rutland, Vermont; Sturgis, Cornish & Burns Company located at Chicago, Illinois, St. Paul, Minnesota, and Kanasa Cala Minnesota. Kansas City, Missouri; and E. W. Ward & Company, of St. Paul, Minnesota; and that the said last named purchase was made in 1905; ad-nots that some of said purchases were made by the purchase of person's property only, and sometimes by the purchase of both personal and wal property, and sometimes by the purchase of capital stock of the conversion conducting the business; and that this defendant has discontinued entirely some of the said places of business, has conducted others in the name of the concern so bought out, and still others in its own name; and, except as in this paragraphs and in the last preceding paragraph admitted, denies the allegations of paragraphs "48" and

(21) Admits that plaintiff, D. E. Virtue, and defendant La Bare and defendant Higgs are residents as in seid constaint stated; that the Owstones Fanning Mill Company is, and during all the times m said complaint mentioned has been, a corporation under the laws of the State of Minnesots, with its principal place of business at Owatoms, in Steele County; and avera that it has not knowledge or information sufficient to form a belief as to the allegations of paragraph "50" of said complaint beginning with the words "and that during all the times in this complaint mentioned the said Owatoma Fanning Mill Company" to the words "said corporation and said Virtue joint-

(22) Avers that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "60" and "60" of said complaint, or as to any of the allegations of value contained in said complaint.

(23) Denies each and every allegation in said complaint con-tained, except as hereinbefore admitted or denied.

Bur a further and reparate defense said defendant alleges :--

(1) That on November 2nd, 1007, the chaintiffs bereis common action in the District Court of the Fifth Judicial District of the

State of Minnesota, in and for Steele County, in said District, against this defendant and The Owatoma Manufacturing Company, defendant herein; and that said court had jurisdiction of the subject-matter of said action and of the parties thereto.

- (a) That its and by the complaint in said action the said plaintiffs set up in substance all the matters and things alleged in said complaint herein in regard to said soit in equity described in paragraphs "24." "25" and "26" of said complaint herein; that a copy of the complaint in said action in said Steele County is hereto attached, marked Exhibit "2," and made a part hereof; that this defendant and said the Owntonia Manufacturing Company made separate answers to said complaint, and that by its said separate answer this defendant admitted the allegations of the incorporation of the corporations parties to said action, and described the nature of the suit in equity referred to its said complaint, Exhibit "2", and almitted that the said suit therein referred to had terminated in a judgment in favor of the plaintiffs therein and against The Owatoma Manufacturing Company on or about the 25th day of January, 2007, and admitted further that the plaintiffs in said suit procured witnesses in and employed counsel and prepared for trial of said suit, and triad the same in the mass mentioned in the complaint each of the defendants in said action or the manufacture of complaint; and admitted that a copy of the answer of this defendant in said action in said Scele County is hereto attached, marked Exhibit "3", and made a part thereof.
- (3) That such proceedings were duly had in said action in said action was tried at Owatohma, in said Steele County, before the Honorable Thomas S. Buckham, the judge of said court, with a jury; that in said trial the said plaintiffs introduced evidence which they claimed tended to support the allegations of their said complaint in said action, and, among other things, introduced evidence in relation to the several items of damage referred to in paragraphs "all" and "31" of said complaint herein; that on December 18th, 2007, said plaintiffs rested in said action; that the reach of the defendants therein, to-wit:—this defendant and the said Owatoma Manufacturing Company—made a separate motion that the said action be dismissed; that after argument of counsel and omaideration thereof by the court, the said court granted the motion of each of said defendants and dismissed said action on the ground that there was not sufficient evidence of said action on the ground that there was not sufficient evidence of said action on the ground that there was not sufficient

suit in equity referred to in the complaint in said action.

(4) That immediately upon the graviting of said motion the said plaintiffs in said action requested and procured a stay of proceedings of sixty days, which stay was subsequently extended by supulation of the parties to june rit, 2008, and that on June 11th, 1908, judgment and disminsely of said action, and for \$12.50 was duly rendered, given and extered in said District Court of Steele County in favor of this defendant; and of said Owatoma Manufacturing Company, defendants therein, and against the said Virtue and said Owatoma Panning Mill Company, plaintiffs therein.

(5) That thereafter the said plaintiffs in said action proposed a settion case therein, to which on June 24th, 1908, each of these de-tendants proposed amendments, and that said proposed case and said proposed assendments were settled and the said case allowed in said action on July 10th, 1908, by the judge who tried the same; that no appeal has been taken by the plaintiffs in said action, or either of them, from said judgment or from any order made in said action, and that the said judgment is unappealed from and unreversed, and that neither of said plaintiffs has, under the laws of the State of Minnesgta, any further right to appeal from said judgment or from any order made in said action.

## III

For a further and separate defense said defendant alleges:-

(1) That on October 19th, 1909, the said Demin E. Virtue one of the plaintiffs herein, commenced an action in the District Court of the Pitth Judicial District of the State of Minnesota, in and for State County, in said District, against this defendant, and The Owntown Minnesotaering Company and Charles H. Higgs (defendants herein) and Martin Deng; that asid court had jurisdiction of the subject-matter of maid action and of the parties thereto, except said Higgs; that the said complaint in said action, and the amendments made there to an Fuhrenzy 196th, 1906, set up all the mattern and things set on in paragraphs "33" and "34" of the complaint herein, and also all the mattern and things set out in paragraph "40" of the complaint therein, to the words "and had it not bean".

(2) That the complaint in said action last named contained, unnoted other things, the following allegations to:

(3) That March 1, 1858, the two defendant corporations above aned by agreements both oral and in writing—none of which writing agreements are now in the possession of the plaintiff, but are all the possession and control of the defendants—and events, once into ad become micephers of and parties to a good teach, combination, and

confederation, with the Cornish, Curtis is ellimic Manufacturing Company, a corporation created and organized under the laws of the State of Wisconsin, here after mentioned, and many other corporations and persons to plaintiff unitiown—ged in lines of business similar to that of said two defendant corporations, to regulate and fix the price of said churus, butter-making machines and creamery supplies and to fix and lidtly the amount of the same to be manufactured, produced or sold, and did so enter into such pool, trust and combination, in restraint of trade, within the State of Minnesotz, which pool, trust and combination did tend, and still tends, to limit, fix, control, maintain and regulate the prices of said churus, butter-making machines and creamery supplies, manufactured, used, bought or sold within the State of Minnesota, and which pool, trust and combination did in fact, and still does, limit, fix, control, maintain and regulate the prices of said articles of trade, within the State of Minnesota, and which pool, trust and combination did limit and still continues to limit and did tend to limit and still tends to limit the production of said articles and did prevent and still prevents and limits competition in the purchase and sale thereof; all of which though said pool, trust and combination was designed to do.

(4) That on or about March 1, 1908, the said two defendants corporations and the said Cornish Curts & Greece Manufacturing Company, together with many other corporations and persons to plainful microwen joined at f associated themselves together into a certain confederation, agreement, combination and understanding for the purpose of controlling, limiting, fixing, maintaining and regulating the tatire business of the manufacture, saic and delivery of combination chorns and butter workers, churns, butter making machines and other creamery supplies, to be manufactured by said parties so associating themselves together, and of offering the same for sale throughout the United States, and of fixing and determining the amount and number of said articles to be manufactured and of fixing and determining the price and the future prices at which all of said articles should from time to time be offered for sale and sold; and of enhancing the price thereof for their own profit and gain without regard to cost, supply and demand, and of preventing any competition in the manufacture axis sale between themselves, and of preventing all other persons not members of said federation, agreement, combination and understanding from engaging in the manufacture of any of the said articles, or offering them for sale and of selling same except upon took terms and conditions as the members of said combination, confederation, agreement and understanding should among themselves determine, and thus secure to themselves the memopoly in the manufacture and sale effectives the times of said combination, confederation, agreement and understanding should among themselves determine, and thus secure to themselves the memopoly in the manufacture and sale effectives the times of said combination, confederation, agreement and understanding should among themselves determine, and thus secure to themselves the memopoly in the manufacture and sale and of said articles throughout the United States, and by the enforce-

ment of which tail defendants make an annual-profit of several hundreds of thousands of dollars.

- (5) That ever since harch 1, 1808, all the agreements and combisition is the two preceding paragraphs mentioned have been by the
  are corporations and persons reserved and continually maintained in
  that case and effect, and have ever since said March 1, 1808, limited,
  freet controlled, maintained and regulated the price of churns, buttersatisfy machines and creamery supplies manufactured or sold by said
  defendants or either of them, and which during all said time have limited the production of said articles and prevented and limited competition in the purchase and sale thereof, and which trust agreements and
  combinations have at all times tended so to do, and under and by
  virtue of which trust agreements and combinations, the plaintiff is
  informed and believes the said Cornish, Curtis & Greene Manufacturing Company were absorbed by the said Creamery Package Manufacturing Company and has ever since ceased to exist as a separate
  corporation.
- (6) That the post and object of said illegal trust and agreeporations, not within said trust, ing and selling churns, butterout of business in the State of the trupt all such corporations and the markets to them and destroy the trade and to ruin all property and property rights of all kinds of said corporations and property rights of all kinds
  - (7) That to earry out the purposes and things hereinbefore mentioned, the two defendants corporations and the said Cornish, Curtis & Greece Manufacturing Company did conspire together to secure the execution of that certain contract, a copy of which is hereto attached and marked Exhibit A, and did induce and bring about the execution thereof for said purposes and not otherwise; and that by reason thereof, on or about January 22, 1900, the said contract was duly made; executed, entered into and delivered by the parties thereto at Chicago, Illinois; and to secure the execution thereof on the part of this plaintiff the said illegal trust and monopoly and the corporations forming the same, stated and represented to plaintiff that the parties of the second part to said contract would faithfully execute and carry out the part of said contract in and to be patent in said contract mentioned; and relying upon said promises and representations of said Contract, the plaintiff was induced to said did execute the same.

(it) That all of the wrongful acts hereinbefore complained of

were malicious and willful, and were date and personnel for the purpose of advancing said illegal trust and combination and for the purpose of financially ruining this plaintiff and for the purpose of destroying the use and value of said patent No. 534.574, and for the purpose of closing the markets for churns and butter workers as against this plaintiff, and for the purpose of securing the same for said illegal trust and combination; all of which has been done by the said illegal trust and combination; that many thousands of dollars worth of said churns, butter-making machines and creamery supplies are annually sold to citizens and corporations of the State of Minnesota, and used by them.

- (12) That the defendant, Charles H. Higgs, during all these times mentioned in this complaint was active in bringing about said illegal trust and combination, and was one of those who did and performed and took part in all the wrongful acts hereinbefore set forth, and all his said acts in the premises were willfull and malicious.
- (13) That by virtue of the foreoing and in consequence and as a result thereof, the value of said patent during the three years mentioned in said contract Exhibit A, was entirely destroyed and taken away from the plaintiff and the plaintiff deprived of all the benefits enumerated in said contract Exhibit A, and that said plaintiff was thus deprived of the use of said patent from the date of said contract throughout the full period of three years and up to the present time and the real value of said patent itself to this date destroyed.
- (14) That the value of the rights and privileges secured to plaintiff under and by virtue of said contract Exhibit A, and of which this plaintiff has been deprived by the wrongful acts of said defendants in the way and manner hereinbefore mentioned, was and is the sum of \$90,000 and that the value of the use of the patent No. 634,074 mentioned in said Exhibit A, ever since the date of said Exhibit A was the sum of \$7,000 a year, and the actual value of said patent the sum of \$100,000; and that the plaintiff has been damaged in the premises by said wrongful acts of said defendants in the sum of \$20,000, not sait of which has been paid.
- (16) That plaintiff did not discover or learn of said wrongful and illegal trust and combinations, nor the said agreements leading up the same, nor the wrongful acts hereinbefore complained of, until as than two years before bringing this action; and that for more than me year and ten months after the date and making of said contract tablibit A, the parties of the second part thereto pretended and claimed plaintiff that they were carrying out the terms thereof and would the future fully carry out and perform the same."

(3) That in said complaint in said action last named it was also

alleged, that the said Marin Deeg, detendant therein, after request from said Virtue, refused to join in said action, and that thereafter said Deeg intervented in said action and adopted all the allegations of the complaint and amended complaint of said Virtue therein; and that said Virtue and said Deeg demanded judgment in said action against defendants therein in the sum of \$50,000.

- (4) That the defendants in said action (except said Deeg and except said Higgs, who were not served) made separate answers to the amended complaint of said Virtue and to the amended complaint in intervention of said Deeg, and in and by its said separate answers the defendants denied the allegations of said complaint act out in paragraph "2" of this subdivision of this answer, and alleged, among other things, the matter set forth in paragraphs "9" and "10" of the first subdivision of this answer; that issue was made by plaintiffs' reply as to the new matter alleged in said answer.
- (5) That thereafter such proceedings were had in said last mentioned action that the said cause was tried before the Honorable Thomas S. Buckham, the judge of said court, with a jury, on June 22nd to 26th, inclusive; that on June 24th, 1908, said action was dismissed as to said Owatoma Manufacturing Company on motion of said Company, and that thereafter the cause proceeded alone against this defendant; that at the trial of said action the said plaintiff and said intervenor introduced evidence which they claimed tended to support the allegations of their said complaint and amended complaint, and this defendant offered evidence tending to support the allegations of its said answer; that said cause was submitted to the jury on said June 20th, 1908, which jury rendered a verdict in favor of said plaintiff and said intervenor for the sum of \$10,000; that thereafter this defendant made a motion on the minutes of said judge who tried said cause that said verdict be vacated and a new trial of said action granted; that such proceedings were had upon said motion that the said judge, on September 9th, 1908, granted said motion and filed his order in said action, wherein and whereby he vacated said verdict and granted a new trial of said action on the ground that said verdict was not justified by the evidence; that said action is now pending and undetermined in said District Court in and for said Steele County.

## W

For a further and separate defense this defendant alleges:-

That if any cause of action he set out in said complaint arising one of or connected with the making of the contract, Exhibit "C", or arising out of or connected with any alleged breach thereof, such cause of action did not accurate within six years next before the commencement

of this suit, and is barred by the statute of limitations of the State of Minnesota.

#### V

For a further and separate defense this defendant alleges:-

That if any cause of action be set out in said compaint arising out of or connected with the making of the contract Exhibit "C", or arising out of or connected with the alleged breach thereof, such cause did not accrue within three years next before the commencement of this suit and is barred by the statute of limitations of the State of Minnesota.

## VI.

For a further and separate defense this defendant alleges:-

That if any cause of action be set out in said complaint arising out of or connected with either of the suits in equity in said complaint mentioned such cause of action did not accrue within three years next before the commencement of this suit, and is barred by the statute of limitations of the State of Minnesota.

# VII.

For a further and separate defense this defendant alleges:-

That as to any damages claimed in said complaint to have been done or suffered by the plaintiff before December 10th, 1902, the same did not accrue within six years next before the commencement of this action, and are barred by the statute of limitations of the State of Minnesota.

## VIII.

For a further and separate defense this defendant alleges:-

That as to any damages claimed in said complaint to have been done to or suffered by plaintiffs before December 10th, 1905, the same did not accrue within three years next before the commencement of this action and are barred by the statute of limitations of the State of Minnesota.

COHEN, ATWATER & SHAW,
Attorneys for Defendant.

The Creamery Package Manufacturing Company, 313 Nicollet Avenue, Minneapole

## EXHIBIT "1".

UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION.

# CREAMERY PACKAGE MANUFACTURING COMFANY,

a corporation

Complainant.

IN EQUITY 633.

OWATONNA FANNING MILL COMPANY, a conporation, and D. E. Virtue,

Defendants.

## DECREE.

This cause came on to be heard before Hon. Charles F. Amidon, Indee of said Court, beginning on Thursday, December 26, 1906, and the hearing was continued on the 27th, 28th, 30th and 31st days of December, 1906, and the 1st, 2nd, 3rd, 4th and 5th days of January, 1907, and the hearing was completed on said 5th day of January, 1907, Said cause was argued on behalf of the complainant by Mr. A. C. Paci, and on behalf of the defendants by Mr. James F. Williamson, and upon consideration thereof it was and is hereby ordered, adjudged and decreed as follows, to-wit:—

That the three jatents involved in said suit, to-wit, Patent No. \$39.571, issued May 21, 1895, to Charles S. Brown, of Lake Mills, Wis., assignor to F. B. Fargo & Co. of the same place; patent No. \$55,720, issued August 11, 1896 to Charles S. Brown of Lake Mills, assignor to F. B. Fargo & Co. of the same place; and patent No. 505,768 issued March 8, 1898 to William E. Penn and Charles S. Brown of Lake Mills, assignors to the F. B. Fargo & Co. all relating to improvements in combined churns and butter workers, are each and all thereof, good and valid patents.

2. That the complainant is the owner of all three of said patents and has the entire right to recover damages and profits from all infringers of said patents or any theseof.

3. That claim t of said Brown Patent No. 539,571; claim 3 of Patent No. 505,720, and claims 2 and 3 of said Penn and Brown patent No. 500,168 have been infringed, and are being infringed by the defendants herein on account of the said defendants' manufacture, sale and use of combined claims and butter workers embodying the inventors that and chained in the above identified claims of said put-

4. That the defendants herein, and each thereof, and their successa, thereby, agents, servants and employees and associates in busing he and they each hereby are enjoined and commanded to design from the further manufacture, sale or use of any combined charms and butter workers, or material parts thereof embodying any of the inventions disclosed in the thought destined claims of said patents, to wit: Claim 1 of the Brown Patent No. 539,571; claim 3 of the Brown Patent No. 505,720, and claims 2 and 3 of the Penn and Brown Patent No. 600,168, and shall so continue to desist from the manufacture, sale or use of the said respective inventious throughout the remainder of the life of said page.

5. That the complainant shan recover from said defendants the damages sustained by the complainant by reason of said infringement, as well as the profits, gains and savings made or realized by the defendants on account of said infringement, and that the defendants shall account to the complainant for all such profits and damages,

6. That this case is hereby referred to Howard S. Abbott, Master in Chancery of this court, with full authority to take, state and ceport to this court a full account of the damages sustained by the complainant, and a full account of the profits, gains and advantages realized by the defendants from the said infringement of the said patents, and to this end, the said Master shall have the power to examine the said defendants and each thereof, their officers, agents, servants and employees, and all others directly or indirectly employed in the manufacture, sale or use of said machines, and to examine all the books of account or other records of the said defendants relating to the said manufacture, sale or use of any of said infringing machines, or material parts thereof, and to compel the attendance of witnesses before him at such places and times as he may determine upon, to administer ouths thereto, and to compel the production of all books of account and other records of said defendants, or any of their agents, relating to the manofacture and sale of said muchines, so far as by said Master may be deemed necessary for said purpose, and the said Master shall have authority to take testimony relating to said accounting wherever he may deem the same necessary and desirable, whether that he within or outside the District of Minnesota.

7. That the complainant shall recover from the defendants its costs, the same to be taxed in this case.

Charles I. Amidon, Judge

Dated January 26, 1907.

EXHIBIT "2".

STATE OF MINNESOTA.

DISTRICT COURT. STEPLE COUNTY. D. E. VIRTUE and THE OWATONNA Family Mill Company

-

COMPLAINT.

THE CREAMERY PACKAGE MANUFACTURING COMPANY and The Owntowns Manufacturing Company.

Plaintiffs, for their complaint against the defendants, allege:-

1

That the plaintiff, The Owatonna Fanning Mill Company, is and during all the times hereinafter mentioned has been a corporation, duly organized and created under and by virtue of the laws of the State of Misnesota.

2

That the defendant, Creamery Package Manufacturing Company, is and during all the times hereinafter mentioned has been a corporation, duly organized, created and existing under the laws of the State of Illinois, and during all the time mentioned in this complaint has been and still is admitted to transact business in the State of Minneseta as a foreign corporation.

3

That the defendant, Owatonna Manufacturing Company, is and during all the times hereinafter mentioned has been a corporation, duly organized, created and existing under the laws of the State of Minnesota, with its office and principal place of business in the City of Owatonna, in said state.

4

That on or about the 15th day of July, 1904, the defendants maliciously and without probable cause or excuse caused to be commenced
and prosecuted an action against the plaintiffs herein in the Circuit Court
of the United States, in the Fourth Division, in the State of Minnesota,
upon the false and groundless claim that the plaintiffs herein were
mantifacturing and selling, without beht or authority, certain churns
and letter making machines, the right to manufacture which was
usual and hold exclusively by the defendant. The Owatomia Manucertaing Company under certain alleged patents held by said Owauna Manufacturing Company and issued to them by the United
Setes Government and that these plaintiffs by reason thereof were
activities upon certain patents and patent rights owned and held by
all Owatomia Manufacturing Company, in which action the said
Organica Manufacturing Company was plaintiff and these plaintiffs

vere defendants; in which action in the Circuit Court the defendants herein claimed and alleged that the plaintiffs herein were indebted to the said Owatoma Manufacturing Company in a large sum, when in truth and in fact the plaintiffs herein were never indebted to said Owatoma Manufacturing Company in any sum whatever, all of which the defendants herein at all times well knew; and in which case in the Circuit Court the defendants herein further asked and songin that the plaintiffs herein be forever restrained and prevented from enraging in the manufacture of churns and butter making machines, in which business during all the times mentioned herein the plaintiffs had invested at the City of Owatonna Minnesota, large sums of money, to-wit,-more than \$20,000, which mosey was so invested in a manufacturing plant, patterns and machinery in said Owatonna for the purpose of making such churns and butter making machines, and the value of which machines, patterns and manufacturing plant would have been more than half taken away from the plaintiffs herein and lost to them had the defendants herein prevailed in said action in the Circuit Court and gained the relief they sought therein, while in truth and in fact the plaintiff in said action in the Circuit Court never had any right or authority to restrain or prevent the plaintiff herein from engaging in the manufacture of churns or butter making machines, as the defendants herein at all times knew.

5

That plaintiff was obliged to and did appear by attorney and made answer to and defended against said action; and the same was duly tried before the Hon. Charles F. Amidon, Judge of said United States Court, at Minneapolis, Minnesota, and a decision and judgment was thereupon at the end of said trial duly rendered and entered in favor of the plaintiffs herein and against the defendants on or about the 25th day of January, 1907, and said action in the United States Court was duly terminated and ended wholly in favor of the plaintiffs herein and against the defendants. That the Circuit Court was a court of general jurisdiction and had full authority and jurisdiction to try and determine all matters involved in said action pending therein on their merits, and did so try and fully and finally determine in favor of the plaintiffs herein all said matters.

6

That the plaintiffs herein were put to great trouble, inconvenience and expense, and were obliged to do and did do a large amount of work and travel many thousands of miles by themselves and their agents, and were obliged to and did procure witnesses, employ counsel and prepare for trial, and try said action on the merits, and

therefor. And the plaintiffs were obliged to and did cause and employ the plaintiff were obliged to and did cause and employ the plaintiff b. E. Virtue to put in over three years time at with upon said case in properly preparing the same for trial and in detenting the same, all of which things the said D. E. Virtue to put in the said D. E. Virtue to put in the said by any virtue was at places is distance from his home and a traveling about the country, and that the reasonable value of the time and labor so put in and performed by said Virtue in said matter was and is the sum of \$6,000 per year, all of which was necessarily done and in so traveling about the said Virtue was necessarily required to and did expend and lay out more than the sum of \$2,000; and the plaintiffs herein were obliged to and did by out and expend to attorneys in defending said case more than the sum of \$15,000; and in procuring necessary expenses connected with said trial and in paying other necessary expenses connected with said trial in the United States Court these plaintiffs paid out and expended more than the sum of \$5,000; all of which money and sums hereinbefore mentioned were reasonable and proper and were necessarily expended by these plaintiffs in and about said action in the United States Court; and that more of said atoms has been paid back to these plaintiffs, nor has any part thereof.

7

That all of the acts of the defendants hereinbefore specified were without probable cause and were analicious, and were all done with actual malice on the part of the defendants herein; and were all done and performed by said defendants for the purpose of driving them out of business, the plaintiffs and for the purpose of driving them out of business, the plaintiffs and the defendants herein during all the times above mentioned being the owners, managers and operators of separate plants and machinery in the building and constructing of churas and butter making machiness and all the claims of the defendants herein made in said action in the Circuit Court were groundless and false, and were at all times known by the defendants herein so to be.

That by reason of the foregoing these plaintiffs have been damged in the sum of 161,000.

Within PORE, the plaintiffs berein densited judgment regions to extendents for the said sum of \$51.000, and for the turther soin \$250,000 as exemplary through together with the costs and dis-

bursements of this action.

# LEACH & REIGARD, Attorneys for Plaintiff, Owstonna, Minnesota.

# STATE OF MUNNESOTA, COUNTY OF STEELE, 80.

D. E. VIRTUE being first duly sworn, says: that he is one of the attorneys in the above satisfied action; that he has read the foregoing complaint; knows the contents thereof; and that the same is true to his own knowledge and belief except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

D. E. VIRTUE,

Subscribed and sworn to before me this and day of November,

HARLAN E. LEACH.

Notary Public, Steele County, Minnesota. My commission expires January 2, 1912.

(Seal.)

# EXHIBIT "3."

STATE OF MINNESOTA.

DISTRICT COURT

COUNTY OF STEELE

FIRTH JUDICIAL DISTRICT.

D. E. VIRTUE AND THE OWATONNA FANNING MILL COMPANY

THE CREAMERY PACKAGE MANUFACTURING COMPANY AND THE OWATONNA MANUFACTURING COMPANY

SEPARATE ANSWER OF DEFENDANT

THE CREAMERY PACKAGE MANUFACTURING COMPANY

For its separate answer berein The Crasmery Package Manufacturing Company, defendant above named,—

Admits the allegations contained in paragraph " " " and

- 2. Admits that on or about July 19th, 1904, the defendant, The Owatonna Manufacturing Company, commenced an action against the plaintiffs herein, as defendants, in the Circuit Court of the United States for the District of Minnesota, Fourth Division; that at the commencement of said action the said The Owatonna Manufacturing Company was the owner and bolder of a patent issued by the United States Government for certain improvements in combined churus and butter workers, and that in said action the said The Owatonna Manufacturing Company prayed a decree of said Circuit Court that the defendants in said action had infringed said patent, and that they should account to it for the profits they had made from such infringement, and should in addition pay the damager sustained by plaintiff therein from such infringement; that in said action said plaintiff therein further prayed that the defendants therein should be enjoined and restrained from making, using or vending to others to be used, the improvement and invention described in said patent, or any part thereof, or any combined churn or butter worker made in accordance therewith.
- 3. Admits that the plaintiffs herein appeared by attorney and made answer in and defended said action, and that the same was duly tried before the Honorable Charles F. Amidon, a judge of said Court, at Minnespolis, Minnesota, and a decision and judgment was duly rendered and entered in favor of the plaintiffs herein and against the said The Owatonna Manufacturing Company, on or about the 25th day of January, 1907; that the said Court was a Court of general jurisdiction and had full authority and jurisdiction to try and determine the matters involved in said action, and did try and finally determine the same in favor of plaintiffs herein and against said defendant. The Owatonna Manufacturing Company.
- 4. Denies that it has any knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph "6" of said complaint, except that it admits that the plaintiffs betein procured witnesses, employed counsel and prepared for this of said action, and tried the same on the merits, and that this defendant has not paid to defendant any part of the sums mentioned in said paragraph "6."
- Admits that during the times mentioned in the complaint each of the defendants owned a plant for the manufacture of combined churms and better workers, and denies that it has any know-

edge or information sufficient to form a belief as to the amount of money invested by plaintiffs in its plant for making churns and butter making machines at Owatonna, Minnesota.

 Denies each and every allegation of said complaint contained, except as hereinbefore admitted or specifically dimied.

WHEREFORE, Defendant asks to be hence dismissed, with its

COHEN, ATWATER & SHAW, Attorneys for Defendant,

The Creamery Package Manufacturing Company., 313 Nicollet Avenue, Minneapolis, Minn.

UNITED STATES CIRCUIT COURT,
DISTRICT OF MINNESOTA,
FIRST DIVISION.

D. E. VIRTUE AND THE OWATONNA FANNING MILL-COMPANY, Plaintiffs,

YB.

THE CREAMERY PACKAGE MANUFACTURING COMPANY, The Owatoma Manufacturing Company, Thomas J. Howe, Frank LaBare and Charles H. Higgs, Defendants.

# SEPARATE ANSWER

OF DEFENDANT, THE OWATONNA MANUFACTURING COMPANY TO AMENDED AND SUPPLEMENTAL COM-PLAINT AS AMENDED JANUARY 5, 1909.

And now comes the defendant, the Owatonna Manufacturing Company and for its separate answer to the amended and supplemental complaint as amended January 5, 1909.

#### 11

Defend at admits the allegations of the first seven lines of paragraph "1" and the first fifteen lines of paragraph "10" and admits that on January oth, 1908, the Greamery Package Manufacturing Company assigned to the Owatouna Manufacturing Company a certain judgment for costs set out in Exhibit "E-4" and that on January other costs set out in Exhibit "E-4" and that out in Exhibit "E-4" and th trary 27th, 1008, a copy of said exhibit was served on plaintiff, and admits that plaintiff and the defendants, the Owatonna Manufacturing Company and Frank Lablare are residents of the City of Owatonna, Minnesota, and that the defendant Charles H. Higgs is a resident of the City of Chicago, and admits that the Owatonna Farming Mill Company is a corporation and has been during all the times set out in the complaint bersin, organized under the laws of the State of Minnesots; and admits the allegations of paragraphs "18," "22" and admits on its information and belief paragraph "23," and admits the allegations of paragraphs "25," "26," "27" and paragraph "29," except the words "and still is pending in said United States Circuit Court;" and admits the allegations of paragraph "30" of said complaint, and alleges that said action in said paragraphs "29" and "30" mentioned was pending until January 26th, 1907, on which day a final decree was made, rendered and entered in favor of the com-plainant therein and against the defendants therein, and that a copy of said final decree is hereto attached marked Exhibit "A," and made a part hereof, that the defendants in said action duly appealed from said decree to the Circuit Court of Appeals of the United States for the Eighth Circuit and that thereafter on January oth, 1908, their said appeal was dismissed by the said Circuit Court of Appeals for want of prosecution and that said decree stands as the final decree in said action unappealed from and unreversed.

And defendant further admits that it has been manufacturing the Dishrow Combined Churn and Butter Worker and extras therefor and shipping them by common carriers during all the time set out in the complaint, but denies that the defendant, The Creamery Package Manufacturing Company, has anything to do with the business of this defendant in any manner whatever, except that the said creamery Package Manufacturing Company is the sole sales agent for this defendant of said Dishrow Combined Churns and lutter Workers, (which said churn and butter worker is a patented criticle manufactured under Letters Patent owned and controled solely by this defendant.)

Defendant alleger that it has not knowledge or information sufficient to form a belief as to the allegations of paragraph "1" after the first seven lines thereof, or of paragraphs "2," "3," "4," "5," "6," "7," "9," "9," or of paragraph "10" (except that defendant admits the following allegation in said paragraph "10" "and during all the times in this complaint mentioned or referred to there were annually many hundreds of thousands of dollars werth of said goods, articles and merchandise sold, shipped and distributed in and through said states"). Or of paragraphs "11," "12," "13," "14," "15," "16," "17," "24," or as to that part of paragraph. "26" after the words "at all times well knew" or as to the allegation in paragraph "31," of said complaint, after the words "at all times well knew" except that it admits that plaintiffs procured witnesses in each of said actions, employed the same counsel in each thereof and prepared said actions for trial and tried the same. And alleges that defendant has not knowledge or information sufficient to form a belief as to the allegations in paragraph "34" to and including the words "lows and South Daleota" (except that defendant admits that said Owatonna Fanning Mill Company prior to the commencement of said two suits in equity as engaged in the manufacture and sale of combined churns and butter workers and manufactured the same at its manufacturing plant in the City of Owatonna, Minnesota). And from the words "that at the time of the commencement" to and including the words "at a large profit to said Owatonna Farming Mill Company and D. E. Virtue

And that it has not knowledge or information sufficient to form a belief as to the allegations in paragraph "35" of said complaint except that the defendant denies that plaintiff has ever been in any way deprived of any use or benefit of any of the property in said paragraph "35" mentioned, by any act of this defendant, and denies that the value of any of the property described in said paragraph "35," or the value of the use of the same has been in any way or is now decreased by any act of this defendant.

Defendant further avers that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "38" of said complaint except that it admits that the United States in due form of law issued to plaintiff Virtue and Martin Deep certain Letters Patent of which the exhibit "F-1" is a copy-

Defendant further alleges that it has not knowledge or information sufficient to form a belief as to allegations contained in paragraph "41" of said complaint except that it admits that the United

States in our form of law accord to plaintiff Virtue and one G. A Hagedorn certain Letters Patent of which Exhibit "F-2" is a copy, and alleges that by the decree Reinhite "A" of this answer, it was become and the fact the invention described and the land always has been the truth that the invention described and change has been an infringement of certain patents corner by the defendant. The Creamery Package Manufacturing Company, which patents are fully described in Exhibit "B-1" of said complaint and in said decree, and that said patent, of which Exhibit "B-3" it a copy, it and always has been utterly void, invalid and of an force or effect.

Defentiant further alleges that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "44" of said complaint; except that it admits that the United States in due form of law issued to said plaintiff Virtue certain Letters Paters of which Exhibit "F-3" of said complaint is a copy,

Defendant further alleges that it has no knowledge or information inflicient to form a belief as to the allegations of paragraph "47" of said complaint except defendant admits that plaintiffs have manufactured, sold and distributed combined churns and butter workers from their said place of business in Owatonna.

Further answering defendant alleges that it has no knowledge or information sufficient to form a helief as to the allegations in paragraphs "45," "49," "50."

Further answering defendant alleges that it has not knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "60" and "62" of said complaint or as to any allegations of value contained in said complaint.

Further susvering defendant alleges and charges that each and all of the agreements set out in the complaint herein and marked "Examine B 1" to and including "Exhibit B 11" had always solely to do with rights under certain letters patent of the United States, described or referred to therein and granted, issued and delivered to the 100 and therefor, under the Acts of Congress in such case made not storided; that the term for which each of said patents were used has not yet expired, and that at the time of the making of the respective agreements the letters patent in each of said agreements referred to were and still are in force and effect and were all said force moved by this defendant, except only the certain letters to be under the control of the said agreements (Caunt and Botter Worter" in Exhibit "B-4", which letters

patent last named were then, and still are, owned by the detendant Creamery Package Manufacturing Company; that the said agreements in said exhibits set furth are the only agreements made by this defendant with said Creamery Package Manufacturing Company in relation to the purchase, sale or manufacture of churns, butter workers or creamery supplies.

For further and separate defense said defendant alleges:-

- (1.) That on November 2d, 1907, the plaintiffs herein commenced an action in the District Court of the Fifth Judicial District of the State of Minnesota, in and for Steele County, in said District, against this defendant and The Creamery Package Manufacturing Company, defendant herein; and that said court had jurisdiction of the subject-matter of said action and of the parties thereto.
- (2.) That in and by the complaint in said action the said plaintiffs set up in substance all the matters and things alleged in said complaint berein in regard to said suit in equity described in paragraphs "24," "25" and "26" of said complaint herein; that a copy of the complaint in said action in said Steele County is hereto attached; marked Exhibit "B", and made a part hereof; that this defendant and said Creamery Package Manufacturing Company made separate answers to said complaint, and that by its said separate answer this defendant admitted the allegations of the incorporation of the corporations parties to said action, and described the nature of the suit in equity referred to in said complaint, Exhibit "B", and admitted that the said suit therein referred to had terminated in a judgment in favor of the plaintiffs therein and against this defendant on or shout the 25th day of January, 1907, and admitted further that the plaintiffs in said suits procured witnesses in and employed counsel and prepared for trial of said suit, and tried the same on the merits, and that this defendant had not paid any part of the sums mentioned in paragraph "6" of said complaint; and admitted also at the times mentioned in the complaint each of the defendants in said action owned a plant for the manufacture of combined churns and butter workers, and denied the other allegations of said complaint; that a copy of the answer of this defendant in said action in said Steele County is hereto attached, marked Exhibit "C", and made a part nercof.
- (3.) That such proceedings were duly had in said action in said Steele County that on December oth, 10th and 11th, 1907, the said action was tried at Owatonna, in said Steele County, before the Honorable Thomas S. Buckham, the judge of said court, with a jury; that

which the time that probable in the consideration of the probable and the consideration of the probable and the consideration of the probable and the consideration of the consid

- (A.). That immediately upon the granting of said motion the said plaintiffs in said action respected and procured a stay of proceedings of sixty days, which may was anterespontly extended by three-soles of the parties to lives integer, and that on finne 11th, 1985, judgment of distributed of said action and to \$2250 was titly endered, given not emercal in said District Court of Steele (Courty in favor of this defendant said of said Cremery Package Manufacturing Company, defendants therein and against the said. Virtue and said Owntones Postning Mill Company, plaintiffs therein.
- (a) The there for the said plaintiffs in said action proposed action case therein to which on June sath, took, each of these definitions proposed anotherent, and that taid proposed use and said proposed user and said action on July 10th 10th, by the judge who tried the same that an appeal has been taken by the obtaining in und action, or either of them amounted judgment or from any order made in said action, and that the said judgment is unspecified from and universely and that action, any factor plaintiffs has under the laws of the State of Minnesots, any factor right to appeal from said judgment or from any color made in we action.

## 

Porte facther and separate defense and defendant alleges -

(1) This on Outdoor to be tigot, the said Dennis E. Vintoe, the of the plantis hardes recommended an action in the District Court of the State of Minnesott, in and to fixed Court, in and State of the State of Minnesott, in and the Court of State of Minnesott, in and Court of State of Minnesott, and July Occasion Principle Minnesott of Court of

It is an extensive the respective terms thereof the contract of the contract o

- (a.) That the complaint is said action has marred contained, among other things, the following allegations:—
- "(3.) That March 1, 1808, the two defendant corporations above named, by agreements both oral and in writing—core of which written agreements are now in the possession of plaintiff, but are all in the possession and control of the defendants—did create. user into and become members of and parties to a good trast, or tention and confederation, with the Cornish, Cortis & Gree Manufacturing Company, a corporation created and organized under the laws of the State of Wisconsin, became for mentioned, and many when corporations and persons to plaintiff unknown engaged in time of husiness similar to that of said two defendant corporations to requise and for the price of said charas, butter-making unchines and creamery supplies and to fix and limit the amount of the same to be manufactured, produced or said, and did so times into such pool, trust and combination, in reserving of trude, within the State of Minnesota, which pool, trust and combination did tend, and still tends, to limitally, control, maintain and regulate the prices of said charms, butter-making machines and creamery supplies, machinely used, bought or sold within the State of Minnesota, and which pool, trust and combination did in fact, and still does limit fin, control, maintain and regulate the prices of said articles of trade, within the State of Minnesota, and which pool, trust and combination did in fact, and still does limit fin, control, maintain and regulate the prices of said articles and combination did limit and still continues to limit and did tend to limit and still continues to limit and still tends to limit the production of said articles and did provent and still prevents and limits competition in the purchase and preyent and still prevents and limits competition in the purchase, and thereof; all of which things said pool, trust and combine tens designed to do.
- (4.) That on or shout March 1, 1898, the unid two defections comporations and the said Cornish, Curtis & Greens Manufacturin Company, together with many other corporations and persons plainted unknown, joined and associated themselves together in a pertain confederation, agreeness, combination and understanding

the the expected penership stanting their, mentaning the parameter of the experiments of

(c). That ever those March art, their, all the agreements and administration in the two (recenting paragraphs mentioned have been the come compositions and persons removed and continually mainted in the force and office, and leave ever since said March 1, all limited force, controlled, insulatined and regulated the prior charge, butter ending machines and creamery supplies manufacture of and by ward defendants, or either of them, and which directly and fine have limited the production of said articles and eventual and halted competition in the purchase and age thereof, a which trust agreements and combinations have at all times tended to do, and under and by virtue of which trust agreements to the paragraphs and believe the combinations, the phinties is informed and believes the said white Circle & Greens Vinnifectoring Company were absorbed the said Chambery Package Majorisetoring Company and has a bloke country to exist as a separate exponsion.

(6.0) That the process and object of such illegal time and agree-ment, we is there all persons and expectations, not within said treat, agreed in the persons of manufactoring and alling chains, butter chain matches by excess, applies out of tentions in the State placements, and to came and contact increase of match corporations

- that prevent work in table and to reduced property and property and property rights of all blacks of raid corporations and property.

  (7.) That we carry out the purposes and things bereinbefore asymmetric the two defangasts corporations and the said Coroth.

  Cartle & Green Manufacturing Company hid compare algebras as secure the execution of that certain contract, a copy of which is better attached and matter Exhibit "A," and the indicate and bring about the execution thereof for said purposes and not otherwise: and that by reason thereof on or about Jamary as 1000, the said contract was daily made, executed, entered into and delivered by the parties thereto at Chicago, Himois; and to secure the execution thereof or the part of this plaintiff the said illegal trust and mesopoly and the corporations forming the tame, stated and represented to plaintiff that the parties of the second part to said centract would faithfully execute and carry out the same and would work to advance the interests of the parties of the first part of said contract in and to the patters in and contract mentioned; and relying upon said promises and representations of said illegal trust and monopoly and of the parties of the second part to said contract the plaintiff was included to and this execute the same.
- (11) That all of the wrongful acts hereinbefore complained of were malicious and willful, and were done and purformed for the purpose of advancing said illegal trust and combination and for the purpose of financially running this plaintiff and for the purpose of destroying the use and value of said patent No. 634,074, and for the purpose of closing the markets for churns and butter workers as against this plaintiff, and for the purpose of securing the same for said liberal trust and combination; all of which has been done by the said illegal trust and combination; that many thousands of s worth of said charms, butter making machines and creamery so are annually sold to citizens and corporations of the State of Min-peacts, this used by them.
- (12) That the defendant Charles H. Higgs, during all the note mentioned in this complaint was active in bringing about a legal trust and combination, and was one of those who did eformed and took part in all the wrongful auta hereinbefore rth, and all his said acts in the premises were wilful and malicio
- (15) That by virtue of the foregoing and in consequence and as result thereof, the value of said patent during the three years result (newol, one value Exhibit A, was enti-

nation away from plinning and the planning deprived of all the benefits improported in said contract Exhibit A, each that said planning was this deprived of the use of said patent from the data of said contract throughout the full period of three years and up to the present time and the sail value of said patent itself to this data deaccount.

- (14.) That the value of the rights and privileges secured to plaintiff under and by virtue of said contract Exhibit A, and of which this plaintiff has been deprived by the wrongful acts of said defendants in the way and manner hereinbefore mentioned, was and is the sum of \$50,000 and that the value of the use of the patent No. 60,000 mentioned in said Exhibit A, ever since the date of said Exhibit A, was the sum of \$7,000 a year, and the actual value of said patent the sum of \$100,000; and that the plaintiff has been damaged in the premises by said wrongful acts of said defendants in the sum of \$00,000, not part of which has been paid.
- (16.) That pasietiff did not discover or learn of said wrongful and illegal trust and combinations, nor the said agreements leading up to the same, nor the wrongful acts hereinbefore complained of, intil less than two years before bringing this action; and that for more than one year and ten months after the date and making of said contract Exhibit A, the parties of the second part thereto pretended and claimed to plaintiff that they were carrying out the terms thereof and would in the future fully carry out and perform the same.
- (3) That in said complaint in said action last named it was also alleged that the said Martin Deeg, defendant therein, after request from said Virtue, refused to join in said action, and that thereafter said Deeg intervened in said action and adopted all the allegations of the complaint and amended complaint of said Virtue therein; and that said Virtue and said Deeg demanded judgment in said action against defendants therein in the sum of \$90,000.
- (4) That the defendants in said action (except said Deeg and except said Higgs, who were not served) made separate answers to the amended complaint of said Virtue and to the amended complaint in intervention of said Deeg, and in and by its said separate insurers the defendants desaid the allegations of said complaint set of in paragraph "s" of this embilistation of this answer, and alleged, make other things, on information and belief that said parties of the second part to said contract had in all respects performed their

part of said contract; that issue was made by plaintiffs' reply as to the new matter alleged in said answer.

(c) That thereafter such proceedings were had to said last menthomas S. Buckham, the Lage of said court, with a jury, on June 22d to 26th, inclusive, that on June 24th, 1908, the said action was dismissed as to this defendant on notion of said defendant and that thereafter the cause proceeded alone against The Creamery Package Manufacturing Company; that the trial of said action the said plaintiff and said intervenor introduced evidence which they claimed tended to support the allegations of their said complaint and amended complaint, and the Creamery Package Manufacturing Company offered evidence tending to support the allegations of its said answer; that said cause was submitted to the jury on said June 26th, 1908, which jury rendered a verdict in lavor of said plaintiff and said intervenor for the sum of \$10,000; that thereafter the Cresmery Package Manufacturing Company made a motion on the minutes ofsaid judge who tried said cause that said verdict be vacated and a new trial of said action granted; that such proceedings were had upon said motion that the said judge, on September 9th, 1908, granted said motion and filed his order in said action, wherein and whereby he sacated said verdict and granted a new trial of said action on the ground that said verdict was not justified by the evidence, that said action is now pending and undetermined in said District Court in and for said Steele County.

# IV.

For a further and separate defense this defendant alleges:-

That if any cause of action he set out in said complaint arising out of or connected with the making of the contract, Exhibit "C", or arising out of or connected with any alleged breach thereof, such cause of action did not accrue within six years next before the commencement of this suit, and is barred by the statute of limitations of the State of Minnesota.

# Y

For a further and separate defense this defendant alleges:—
That if any cause of action be set out in said complaint arisin, out of or connected with the making of the contract Exhibit "C", or arising out of or connected with the alleged breach thereof, such cause of action did not accrue within three years next before the commencement of this suit and is barred by the statute of limitations of the State of Minnesota.

Por a further and separate defense this defendant alleger:—
That if any cause of action be set out in said complaint arising out of or connected with either of the suits in equity in said complaint mentioned, such cause of action did not accrue within three years next before the commencement of this suit, and is barred by the statute of limitations of the State of Minnesota.

## VIII.

For a further and separate defense this defendant alleges:—
That as to any damages claimed in said complaint to have been done or suffered by the plaintiff before December 10th, 1900, the same did not accrue within six years next before the commencement of this action, and are barred by the statute of limitations of the State of Minusesots.

## VIII.

For a further and separate defense this defendant alleges:—
That as to any damages claimed in said complaint to have been done to or suffered by plaintiffs before December 10th, 1905, the same did not accrue within three years next before the commencement of this action and are barred by the statutes of limitations of the State of Minnesota.

W. A. SPERRY,
Attorney for Defendant,
The Owatonna Manufacturing Co.,
Owatonna, Minnessota.

A. C. PAUL, of Counsel.

# EXHIBIT A

UNITED STATES CIRCUIT COURT.

DISTRICT OF MINNESOTA, FOURTH DIVISION.

Creamery Package Manufacturing Company, a corporation.

Complainant,

IN EQUITY 633

Owatonna Fanning Mill Company, a corporation, and D. E. Virtue,

#### DECKED.

This cause came on to be betted before Hon. Charles F. Amidon, Judge of said court, beginning on Thursday, December 26, 1906, and the hearing was continued on the 27th, 28th, 30th and 31st days of December, 1906, and the 1st, 2nd, 3rd, 4th and 5th days of January, 1907, and the hearing of the cause was completed on said 5th day of January, 1907. Said cause was argued on behalf of the complainant by Mr. A. C. Paul, and on behalf of the defendants by Mr. James F. Williamson, and upon consideration thereof it was and it hereby ordered, adjudged and decreed as follows, to-wit:

- 1. That the three parents involved in said suit, to wit, Patent No. 539:571, issued May 21, 1895 to Charles S. Brown, of Lake Mills, Wis., assignor to F. B. Fargo & Co. of the same place; Patent No. 565,720 issued August 11, 1896 to Charles S. Brown of Lake Mills, assignor to F. B. Fargo & Co. of the same place; and Patent No.600,168, insued March 8, 1898 to William E. Penn and Charles S. Brown of Lake Mills, assignors to the F. B. Fargo & Co., all relating to improvements in combined churns and butter workers, are each and all thereof, good and valid patents.
- 2. That the complainant is the owner of all three of said putents and has the entire right to recover damages and profits from all infringers of said patents or any thereof.
- 3. That claim 1 of said Brown Patent No. 539,571; claim 3 of Patent No. 565,720, and claims 2 and 3 of said Penn and Brown patent No. 600,166 have been infringed, and are being infringed by the defendants herein on account of the said defendants' manufacture, sale and use of combined churms and butter workers embodying the inventions disclosed and claimed in the above identified claims of said patents.
- That the defendants herein, and each thereof, and their successors, attorneys, agents, servants and employees and associates in business, be and they each hereby are enjoined and commanded to desist from the further manufacture, sale or use of any combined churns and butter workers, or material parts thereof embodying any of the inventions disclosed in the above identified claims of said patents, to-wit: Caim I of the Brown Patent No. 539,577; claim Not the Brown Patent No. 567,720, and claims a and 3 of the Pennand Brown Patent No. 603,128, and shall so continue to desist from

the manufacture, sale or use of the said respective inventions throughout the remainder of the life of said patents and each thereof.

- 5. That the complainant shall recover from said defendants the themoges sustained by the complainant by reason of said infringement, as well as the profits, gains and savings made or realized by the defendants on account of said infringement, and that the defendants shall account to the complainant for all such profits and damages.
- 6. That this case is hereby referred to Howard S. Abbott, Master in Chancery of this court, with full authority to take, state, and report to this court a full account of the damages sustained by the complainant, and a full account of the profits, gains and advantages realized by the defendants from the said infringement of the said patents, and to this end, the said master shall have the power to examine the said defendants and each thereof, their officers, agents, servants and employees, and all others directly or indirectly employed in the manufacture, sale or use of said machines, and to examine all the books of account or other records of the said defendants relating to the said manufacture, sale or use of any of said infringing machines, or material parts thereof, and to compel the attendance of witnesses before him at such places and times as he may determine upon, to administer oaths thereto, and to compel the production of all books of account and other records of said defendants, or any of their agents, relating to the manufacture and sale of said machines, so far as by said master may be deemed necessary for said purpose, and the said master shall have authority to take testimony relating to said accounting wherever he may deem the same necessary and desirable, whether that be within or outside the District of Minnesota.
- 7. That the complainant shall recover from the defendants its costs, the same to be taxed in this case.

Charles F. Amidon, Judge.

Dated January 26, 1907.

EXHIBIT B.

State of Minnesota.

District Court.
Steele County.

D. E. Virrue and The Owatonna Canning Milk Company. The Creamery Package Manufacturing Company and the Owntowns Manufacturing Company.

Plaintiffs, for their complaint against the defendants allege:-

That the plaintiff, the Owatonna Farming Mill Company, is and during all the times hereinafter mentioned has been a corporation, duly organized and created under and by virtue of the laws of the State of Minnesota.

2.

That the defendant, Creamery Package Manufacturing Company, is and during all the times hereinafter mentioned has been a corporation, duly organized, created and existing under the laws of the State of Illinois, and during all the time mentioned in this complaint has been and still is admitted to transact business in the State of Minnesota as a foreign corporation.

3

That the defendant, Owatonna Manufacturing Company, is and during all the times hereinafter mentioned has been a corporation, duly organized, created and existing under the laws of the State of Minnesots, with its office and principal place of business in the City of Owatonna in said state.

4.

That on or about the 15th day of July, 1904, the defendants maliciously and without probable cause or excuse caused to be commenced
and prosecuted an action against the plaintiffs herein in the circuit court
of the United States, in the fourth division, in the State of Minnesota, upon the false and groundless claim that the plaintiffs herein
were manufacturing and selling, without right or authority, certain
churns and butter making machines, the right to manufacture which
was owned and held exclusively by the defendant, The Owatoura Manufacturing Company, under certain alleged patents held by said Owatoura Manufacturing Company, and issued to them by the United
States Government and that these plaintiffs by reason thereof were
infringing upon certain patents and patent rights owned and held by
said Owatoura Manufacturing Company, in which action the said
Owatoura Manufacturing Company was plaintiff and these plaintiffs were defendants; in which action in the circuit court the defendants herein claimed and alleged that the plaintiffs herein were
indebted to the said Owatoura Manufacturing Company in a large-

some when in truth and in fact the particle berein are sever indelited to said Owatouna Manufacturing Company in any som what
ever, all of which the defendants berein at all times well knew; and
in which case in the circuit court the defendants herein further select
and sought that the plaintiffs herein he forever restrained and prevented from engaging in the manufacture of churas and botter making
machines, in which business during all the times mentioned herein
the plaintiffs had invested at the City of Owatoune; Minnesota
large some of money, to wit, more than factors, which money was so invested in a manufacturing plant, patterns and machinery in said Owaton as for the purpose of making such churas and butter making machines, and the value of which machines, patterns and manufacturing
plant would have been more than half taken away from the plaintiffs herein and lost to them had the defendants herein prevailed in
main action in the circuit court and gained the relief they sought therein, while in truth and in fact the plaintiff in said action in the circuit
court never had any right or authority to restrain or prevent the
plaintiff herein from engaging in the manufacture of churas or butter making machines, so the defendants herein at all times well knew.

That the plaintiff was obliged to said did appear by afterney and made answer to said defended against usid action; and the same was the tried before the Hon. Charles F. Amidon, judge of said United States court, at Minneapolis, Minnesota, and a decision and judgment was thereupon at the end of said trial duly rendered and entered in favor of the plaintiffs herein and against the defendants on or about the 15th day of January, 1909, and said action in the United States court was duly terminated and ended wholly in favor of the plaintiffs herein and against the defendants. That the circuit court was a court of general jurisdiction and had full authority and jurisdiction to try and determine all matters involved in said action pending therein on their merits, and did so try and fully and finally determine in favor of the plaintiffs herein all said matters.

That the plaintiffs herein were put to great trouble, inconvenience and expense, and were obliged to do and did do a large amount of work and travel many thousands of miles by themselves and their strents, and were obliged to and did procure witnesses, employ counseled prepare for trial, and try said (cities on the merits, and secessfully expended therein in so doing the sum of over \$40,500 therefor. Indicate the plaintiffs were obliged to and did cause and employ the plaintiff. D. E. Where to put in over three years time at work upon said.

case in property preserving the same for trial and in defending the same, all of which things the said D. E. Virtue faithfully did and performed, and much of the time and labor so put in by said Virtue was at places far distance from his home and in traveling about the country, and that the reasonable value of the time and labor so put in and performed by said Virtue in said matter was and is the sam of \$5,000 per year, all of which was necessarily dame, and in so traveling about the said Virtue was necessarily required to and did expend and lay out more than the sum of \$2,000; and the plaintiffs hereis were obliged to and did pay out and expend to attorneys in defending said case more than the sum of \$25,000; and in procuring necessary expenses connected with said trial and in paying other necessary expenses connected with said trial and in paying other necessary expenses connected with said trial in the United States court these plaintiffs paid out and expended more than the sum of \$5,000; all of which money and sums hereinbefore mentioned were reasonable and proper and were necessarily expended by these plaintiffs in and about said action in the United States court; and that none of said sums has been paid back to these plaintiffs, nor has any part thereof.

72

That all of the acts of the defendants hereinbefore specified were without probable cause and were malicious, and were all done with actual malice on the part of the defendants herein; and were all done and performed by said defendants for the purpose of financially ruining these plaintiffs and for the purpose of driving them out of business, the plaintiffs and the defendants herein during all the times above mentioned being the owners, managers and operators of separate plants and machinery in the building and constructing of churus and butter making machines; and all the claims of the defendants herein made in said action in the circuit court were groundless and false, and were at all times known by the defendants herein so to be.

8

That by reason of the foregoing these plaintiffs have been damaged in the sum of \$81,000.

Wherefore the plaintiffs herein demand judgment against the defendants for the said sum of \$81,000, and for the further sum of \$20,000 as exemplary damages, together with the costs and disbursements of this action.

LEACH & REIGARD,
Attorneys for Plaintiff
Owntoens, Minnesots.

Titue of Minneson. County of Steele, st

D. E. Vietne heing first duly swoen axys:

That he is one of the plaintiffs in the above entitled actions; that he has read the foregoing complaint; knows the contents thereof; and that the same is true to his own knowledge and belief except as to those matters therein stated on information and belief; and as to those matters he believes it to be true.

Subscribed and sworm to before me this 2nd day of November,

D. E. Virtue.

HARLAN E. LEACH. (Seal)

Notary Public, Steele County, Minnesota. My commission expires

#### EXHIBIT C.

State of Minnesota, County of Steele, 18. District Court, Fifth Judicial District.

D. E. Virtue, The Owntonna Fanning Mill Co.,

0.6

The Oceanory Package Manufacturing Company, The Owatoura Manufacturing Company.

The defendant, the Owatonna Manufacturing Company, for the accurate moreor berein respectively shows to the court.

1

This defendant denies each and every allegation, matter and thing in said complaint contained except as her mafter admitted or qualified, admitted or denied.

8 8

This detendant admits the allegations of paragraphs 1, 2 and 3 file templaint and admits that on or about the time municipal in complaint, this defaution commenced as action against the plainful in its discount court of the United States in the district of

Minimeters, ath division; that at the consensement of unit ac-this defendant was the owner and holder of a patent issued by United States government for certain in revenents in on charms and butter workers and that in said action this defendant a decree of said court that the defendants in said action had info said patent and saked that they should account to this defendan the profits they had made from such infringement and should pay the damages sustained by this defendant from such infringement and that the defendants therein should be enjoined and restrained from vostein using or vending to others to be used, the improvement and in tion described in said patent or any part thereof or any combined churns or butter workers made in accordance therewith and admits that the plaintiffs herein appeared by attorney and made mawer in and defended said action and that the same was duly trief before the Hon. Charles F Amidon, a judge of said court at Minneapolis. Minnesota, and judgment was duly rendered and entered in favor of the plaintiffs herein and against this defendant on or about the 25th day of January, 1907, that the said court was a court of general jurisdiction and had authority and jurisdiction to try and determine the matters involved in said action and did try and determine the same in favor of the plaintiffs herein and against this defendant. This defendant further admits that during the time mentioned in the complaint herein each of the defendants owned a plant for the manufacture of combined churns and butter workers.

#### III.

Defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6 of said complaint, except that it admits that the plaintiff herein produced witnesses, amployed counsel, prepared for trial and tried said action on the merits and that defendant has not paid to this plaintiff and part of the same mentioned in said paragraph 6 and this defendant denies that it has any knowledge or information sufficient to form a build as to the amount of money invested by plaintiffs in its plant for making churns and butter making machines at Owatonna, Minnesons. Wherefore this defendant tasks that the plaintiff herein take nothing by said action and that this defendant have judgment herein dismissing said action and forfeits costs and disbursements.

W. A. SPERRY, Attorney for Defendant, Owntonna Mfg. Co. State of Minnesota, Closety of Siecle, sa

It is those, being daily aways an oath, deposes and says that he is the accretary of the defendant. The Gwatours Manufacturing Commany, that he has beard read the foregoing answer and known the occurres thereof and that the same are true energy as to those matters within stated on information and belief and as to those he believes them to be true.

H. C. HOWE

Cobserribed and severe to before me this 19th day of November A. D. 1907.

W. A. SPEKRY

Notary Public Steele County, Minn:
P. O. Owstones, Minn. My commission expires Sept. 23, 1911.
(Seel.)

# UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA. FIRST DIVISION.

D. E. VIRTUE AND THE OWATONNA FANNING MILL COMPANY, Plaintiffs,

13

THE CREAMERY PACKAGE MANUFACTURING COMPANY, The Owatoms Manufacturing Company, Thomas J. Howe, Frank LaBare and Charles H. Higgs, Defendants.

AMENDMENT TO SEPARATE ANSWER OF DEFENDANT THE CREAMERY PACKAGE MANUFACTURING COMPANY.

The detendant, The Creamery Package Manufacturing Company, seeby amends its separate answer likel herein on January 25th, 000, he adding to said separate answer, immediately after parameter "f" thereof, the following paragraph:—

Alloger that each and all the agreements set out in said

Union States described and referred to therein; and Jegos or information and belief that each of said letters patent were granulatined and delivered to the applicant therefor under and in pursuants of the Acts of Congress in such cases provided; that prior to the jumper of each of unid persons all proceedings required by the Acts of Congress in be taken prior to sae issuance of letters patent of the United States for new and useful invertions were in fact taken; that the term for which each of said patents was issued that not yet expired, and that at the time of the making of said respective agreements the letters patent in each of said agreements, referred to were in full force and effect, and were then and still are owned by said Owatoma Manufacturing Company, except only the certain letters patent for a combined churn and butter-worker called the "Victor Combined Churu and Butter-worker," mentioned is said Rahibit "B-4"; and alleges that said letters patent last mentioned were at and before the making of said agreement Exhibit "B-4", and still are, owned by this defendant; that the agreements Exhibits "B-1" to "B-8", inclusive, are the only agreements made by this defendant with said Owatoma Manufacturing Company in relation to the purchase, sale or manufacture of churus, butter-worker or or creamery supplies."

Dated January 28th, 1909.

COHEN, ATWATER & SHAW,
Attorneys for Defendant,
The Creamery Package Manufacturing Company,

UNITED STATES CIRCUIT COURT,
DISTRICT OF MINNESOTA,

FIRST DIVISION.

D. E. VIRTUE AND THE OWATONNA FANNING

THE CREAMERY PACKAGE MANUFACTURING COMPANY, The Owntonia Manufacturing Company, Thomas J. Howe, Frank Lathere and Charles H. Higgs, Defendants.

#### The District DANGS OF SARCH

#### RO AMENDIO AND SUPPLIMENTAL DOMPLATING

#### AN AMENDED SANUARE & 1000.

Schendard decrees such and every allegations in said comple blood accept as herein admitted or denied.

Admits the allegations of the first seven lines of paragraph "1" and the first bitteen lines of paragraph "6" and admits that on remarky oils, 1908. The Oremery Package Manufacturing Communications to the Owacoma Manufacturing Computy a certain adminst for costs set on an Exhibit "F4" and that an January year UoR 4 coopy of and Exhibit was served on plain off and admits their plaintiff and the defendant, The Owacoma Manufacturing Company and Frank LaBere are resident of the Ony of Owacoma, Manuscota, and that the defendant Charles H. Higgs is a resident of the City of Chicago and admits that the Owatoma Fanuing Mill Company is a corporation and has been doing all the times et out in the complaint herein againsts further by any of the State of Manuscota; and admits the illegations of paragraphs "18" and "22" and admits on his information and action for paragraphs "18" and admits the allegations of paragraphs "18" and admits the allegations of paragraphs "18" and paragraph "19" except the words "and will be pending to said United States Circuit Court"; and admits the allegations of paragraphs "10" of said complaint and alleges that and action is easily paragraphs "10" of said complaint and alleges that and action is easily paragraphs "10" of said complaints and alleges that and action is easily paragraphs "10" of said complaints therein and assums the defendance therein. An that a copy of said facility decreases the factor of Appeals of the United States for the Eighth Communication the meanufactor of the United States for the Eighth Communication the meanufactor of the United States for the Eighth Communication to the mill the oil Court of Appeals of the United States for the Eighth Communication to the mill the oil Court of Appeals of the United States for the Eighth Communication to the mill the oil Court of Appeals of the United States for the Eighth Court and the first the first Court of Appeals of the court of Ap

the Debelo Contined Chara and Butter Worler and terral therefor and thipping them by connect carriers during all the time on our at the combinate for during all the time on our at the combinate for Combine hist may thing to do with the butters of the defendant. The Overturna Manufacturing Company in any minuter whatever, except that the said Creamery Pacings Manufacturing Company is said take agent for the Owntowns Manufacturing Company of said Distrey Combined Charas and Butter Workers, which said chara and butter worker is a patented article manufactured under letters patent owned and controlled solely by the Owntowns Manufacturing Company.

#### m.

Defendant alleges that he has not knowledge or information sufficient to form a belief as to the allegations of paragraphs "1" after the first seven lines thereof, or of paragraphs "2" "1" "4" "4" "5" "0," "7," "8," "9" or of paragraphs "10" (except that defendant attents the following allegation in said paragraph "10" "and during all the times in this complaint mentioned or referred to there were annually many hundreds of thousands of collars worth of said goods. articles and merchandise sold, shipped and distributed in and throughout said states"). Or of peragraphs "11," "12," "13," "14," '13," "16," "37," "24" or as to that part of paragraphs "25" after the words "at all times well knew" or as to the allegation in paragraph "31". of said complaint, after the words "at all times well knew" ear that it attracts that plaintiffs procured witnesses in each of said acts comployed the came commet in each thereof and prepared said actions for trial and tried the same. And alleges that defendant has not anowledge or information sufficient to form a belief as to the allegations in paragraph "34" to and including the words "lows and g the words "lows and count Dakota" (except the defendant admits that said Gwaton saming Mill Company prior to the commencement of said ) thits in equity was engaged in the reason factories and take of combine charms and laster workers and manufactored the name at its manufactories, but in the City of Owntowna, Minneson,) and from the rooms that at the time of the commencement, to and including Secreta "at large profit to said Overtonna Panning Mill Company an E Vide

And that defendant has not knowledge or information addiction to form a belief as to the altegations in paragraph "13" of said complaint except that defendant denies that plaintiff has ever been in my range deprived of any use of benefit of any of the property in this property in this property in this property in the property in this property in the property in th

denied that the value of any of the property described in said paragraph "35" or the value of the use of the same has been in any way or in now decreased by any act of this defendant.

Defendant further avers that he has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "38" of said complaint except that he admits that the United States in due form of law issued the plaintiff Virtue and Martin Deep certain letters patent of which the Exhibit "P-1" is a copy.

Defendant further alleges that he has not knowledge or information sufficient to form a belief as to the allegations contained in saragraph "41" of said complaint except in a minits that the United States in due form of law insued to plaintiff Virtue and one G. A. Hagedorn certain letters patent of which Exhibit "F-2" is a copy, and alleges that by the decree, Exhibit "A" of this answer, it was determined and it is and always has been the truth that the invention described and claimed in such patent, of which Exhibit "F-2" is a copy, is and always has been an infringement of certain patents cornect by the defendant The Creamery Package Manufacturing Company, which patents are fully described in Exhibit "R-1" of said complaint and in said decree, and that said patent, of which Exhibit "F-2" is a copy, is and always has been utterly void, invalid and of no force or effect.

Defendant further alleges that he has not knowledge or information sufficient to form a belief as to the allegations contained in paragraph "44" of said complaint except that he admits that the United States in this form of law issued to said plaintiff Virtue certain letters parent of which Exhibit "F-3" of said complaint is a copy.

Defendant further alleges that he has not knowledge or information sufficient to form a belief as to the allegations of paragraph "47" of said complaint except defendant admits that plaintiff The Owatouna Fanning Mill Company has manufactured, sold and distributed combined churns and butter workers from its place of business in Owatouna. Further answering defendant alleges that he has not knowledge or information sufficient to form a belief as to the allegations in paragraphs "48," "49," "50."

Further answering defendant alleges that he has not knowledge or information sufficient to form a belief as to the allegations confitted in paragraphs "60" and "62" of said complaint or as to any allegations of value confirmed in said complaint.

Dusting answering defendant alleges and charges that each and all of the agreements wit out in the complaint herein and marked "Exhibit Bit to and accurring "Exhibit B-11" had always solely to do with rights under certain letters patent of the United States, described or referred to thereis and granted, bassed and delivered to the applicant therefor, under the Acts of Congress in such case made and provided; that the term for which each of said patents were inseed has not yet expired, and that at the time of the making of said respective agreements the letters patent in each of said agreements referred to were and still are in full force and effect and were and still are owned by the defendant. The Owatonna Manufacturing Company, except only the certain letters patent for a combined churn and butter-worker, called the "Victor Combined Churn and Butter-Worker" in Exhibit "B-4", which letters patent fast named were then, and still are, owned by the defendant Greamery Package Manufacturing Company; that the said agreements made by the defendant The Owatonna Manufacturing Company with said Creamery Package Manufacturing Company; that the said agreements in said Exhibits set forth are the only agreements made by the defendant The Owatonna Manufacturing Company with said Creamery Package Manufacturing Company in relation to the purchase, sale or manufacture of churos, butter-workers or creamer, supplies.

#### IV.

For a further and separate defense this defendant alleges:-

That if any cause of action be set out in said complaint arising out of or connected with the making of the contract, Exhibit "C," or arising out of or connected with any alleged breach thereof, such cause of action did not accrue within six years next before the commencement of this suit, and is barred by the statute of limitations of the State of Minnesota.

#### V.

For a further and separate defense this defendant alleges:-

That if any cause of action be set out in said complaint arising out of or connected with the making of the contract Eschibit "C", or arising out of or connected with the alleged breach thereof, such cause of action did not accrue within three years next before the commencement of this suit and is barred by the statute of limitations of the State of Minnesota.

#### VI.

For a further and separate defense this defendant alleges:—
That if any cause of action be set out in said complaint arising out of
or connected with either of the units in equity in said complaint megtioned, such cause of action did not accrue within three years next

before the commencement of this suit, and is barred by the statute of limitations of the State of Minnesota.

#### VII.

For a further and separate defense this defendant alleges:—
That as to any damages claimed in said complaint to have been done
or suffered by the plaintiff before December 10th, 1902, the same
did not accrue within six years next before the commencement of this
action, and are harred by the statute of limitations of the State of
Minnesots.

#### VIII.

For a further and separate defense this defendant alleges:—
That as to any damages claimed in said complaint to have been done
to or suffered by plaintiffs before December 10th, 1905, the same did
not accrue within three years next before the commencement of this
action and are barred by the statutes of limitations of the State of
Minnesots.

W. A. SPERRY, Attorney for Befendant, Frank LaBare, Owatonna, Minnesota

A. C. PAUL of Counsel.

### EXHIBIT A.

UNITED STATES CHICUIT COURT.

DISTRICT OF MINNESOTA, FOURTH DIVISION.

Creamery Package Manufacturing Company, a Corporation, Complainant,

IN HOUITY. 633.

Owatonna Fanning Mill Company, a Corporation, and D. E. Virtue, Defendants

#### DECREE

This cause came on to be heard before Hos. Charles F. Amidon, indice of said court beginning on Thursday, December 26th, 1905, and the hearing was continued on the 27th, 28th, 30 and 31st days of December 1906 and the 1st, 2nd, 3pd, 4th and 5th days of 1902, 1907, and the hearing of the cause was completed on ead

5th day of January, 1907. Said cause was argued on behalf of the complainant Mr. A. C. Paul, and on behalf of the defendants by Mr. James F. Williamson, and upon consideration thereof it was and is hereby ordered, adjudged and decreed as follows, to-wit:

- 1. That the three patents involved in said suit to wit. Petent No. \$39,571, insued May 21, 1895, to Charles S. Brown, of Lake Mills, Wis., assignor to F. B. Pargo & Co., of the same place; Patent No. \$65,720 issued August 11, 1896 to Charles S. Brown of Lake Mills, assignor to F. B. Pargo & Co., of the same place; and Patent No. \$60,168 issued March 8, 1898 to William E. Penn and Charles S. Brown of Lake Mills, assignors to the F. B. Pargo & Co., all relating to improvements in combined charms and butter workers are each and all thereof, good and valid patents.
- 2. That the complainant is the owner of all three of said patents and has the entire right to recover damages and profits from all infringers of said patents or any thereof.
- infringers of said patents or any thereof.

  3. That claim 1 of said Brown Patent No. 339,571; claim 3 of latent No. 565,720, and claims 2 and 3 of said Penn and Brown Patent No. 600,166 have been infringed, and are being intringed, by the defendants herein on account of the said defendants' manufacture, sale and use of combined churns and butter workers embodying the inventions disclosed and claimed in the above identified claims of said patents.
- 4. That the defendants berein, and each thereof, and their successors, attorneys, agents, servants and employees and associates in business, be and they each hereby are enjoined and commanded to desist from the further manufacture, sale or use of any combined churns and butter workers, or material parts thereof embodying any of the inventions disclosed in the above identified claims of sald Patents, to-wit: Claim s of the Brown Patent No. 539,577; claim 3 of the Brown Patent No. 505,720, and claims a and 3 of the Penn and Brown Patent No. 600,168, and shall so continue to desist from the manufacture, sale or use of the said respective inventions throughout the remainder of the life of said patents and each thereof.
- 5. That the complainant shall recover from said defendant the damages sustained by the complainant by reason of said infringement, as well as the profits, gains and savings made or realized by the defendants on account of said infringement, and that the defendants shall account to the complainant for all such profits and

damages.

6 There this case is hereby referred to Howard S. Abbott, Master in Chancery of this Court, with full anthority to take, state and report to this court a full account of the damages antained by the complainant and a full account of the profits, gains and advantages realized by the defendants from the said infringement of the said patents, and to this end, the said master shall have the power to occanine the said defendants and each thereof, their officers, agents, acroams and employes, and all others directly or indirectly employed in the manufacture, sale or use of said machines, and to examine all the broke of account or other records of said defendants relating to the said manufacture, sale or use of any of taid infringing machines, or material parts thereof, and to compel the attendance of witnesses before him af such places and times as he may determine upon, to administer ouths thereto, and to compel the production of all books of account and other records of said defendants, or any of their agents, relating to the manufacture and sale of said machines, so far as by said master may be deemed necessary for said purpose, and the said master shall have authority to take testimony relating to said accounting wherever he may deem the same accessary and desirable, whether that he within or outside the District of Minnesota.

7. That the complainant shall recover from the defendants its costs, the same to be taxed in this case.

Dated January 26, 1907.

CHARLES F. AMIDON, Judge.

## UNITED STATES CIRCUIT COURT: DISTRICT OF MINNESOTA.

First Division.

D. E. Victue and the Owatonna Fanning
Mill Company. Plaintiffs.

The Creamery Package Manufacturing

The Owatonus Manufacturing Company,
Thomas J. Howe, Prant L. Bare and
Charles H. Higgs, ... Defendants.

#### REPLY.

TO SEPARATE ANSWER (as amended February 1 1909) of CREAMERY PKG. MFG. CO.

Plaintiffs, for their reply to the separate answer (as amended February 1 1909) of the defendant, The Creamery Package Manufacturing Company, state and allege as follows:

(Reply to Division "I" of said Answer)

ä

Plaintiffs deny that the transportation from one state of the United States to various others and the selling at retail, as set out in paragraph "(3)" of division "I" of said answer, was in the usual course of business, except that it was the usual manner in which said defendants conducted their own particular business, and that said acts were done in violation of law and to the injury and damage of these plaintiffs and each of them.

2

Plaintiffs deny that any of the terms and conditions specified in paragraph "(4)" of said division "I" were legally performed or carried out, but that each and all of said acts were illegally and unlawfally done and performed.

3

Plaintiffs deny each and every allegation, statement, matter and thing contained in that portion of paragraph "(5)" of said division "I" beginning with the words "and alleges" and ending with the end of said paragraph.

4

Plaintiffs deny that any of the matters and things referred to in paragraphs "(6)" or "(7)" of said division "I" were legally done and performed, but were done in violation of law and to the damage and purp of these plaintiffs and each of them.

5

Plaintiffs deny that the "Cornish Company," mentioned in para-

ciff D. E. Virtue or the Martin Deeg, acceptanced in the complete and answer herein, of the making of any test of the chura mentions and referred to in said paragraph "(9)"; and theny that said. Virtuand Deeg agreed with the defendant Creamery Pathage Martin turing Company and the said. Company, or either of the to further test the said churn or correct any weak parts, or to make any corrections in the construction of said churn or said patterns and plaintiffs have not knowledge or information sufficient to forth tioned in said paragraph "(9)" or whether the same broke down or developed week parts, and plaintiffs deny that corrections in the construction of said churn, or in the patterns therefor, amounting to a complete remodeling of said churn, were needed in order to orgroups any well-nest therein.

Plaintiffs deny cach and every allegation contained in paragraph "(10)" of and division "I" of said answer.

Plaintiffs admit that Exhibit "1" attached to said answer, is a copy of a decree made and rendered in the above named circuit court in the suit in equity formerly brought by the Creamery Pankage Manufacturing Company as plaintiff and against these plaintiffs as defendants, and admit an appeal therefrom referred to in paragraph. "(12)" of said division "I" of said answer and the dismissal of such appeal; but these plaintiffs deny that said decree was a final decree, and that said action has been determined, and that any final decree has ever been made, rendered or entered therein, and plaintiffs allege that said so called decree was and is only interlocatory and that no account has ever been stated or reported by the referse, or say testimony taken by him, in said matter, as provided for in paragraph "6" of said interlocutory decree, nor have any proceedings been had or taken in said court subsequent to the making and filing of said interlocutory decree.

Plaintiffs deny each and overy allegation in paragraph "(17)" of that portion of said maswer marked "I" beginning with the words and allege that" and ending with the end of said paragraph.

(Reply to Division "II" of said Auswer).

graph "(a)" of unit division "H" of said account, except plaintiffs deay that in the emplaint is said action in the District Court of Stock County, mentioned in said division "H", the plaintiffs herein set up in subsector all the matter and things alleged in the complaint in this action is regard to said suit in equity described in paragraphs "(24)", "(25)" and "(25)" of the complaint in this action.

#### 10.

Praintiffs admit each and every allegation stated in paragraph "(3)" of said division "H" of said answer except that these plaintiffs have not knowledge or information sufficient to form a belief as to why, for what remon, or on what ground the said district court of Steele County granted the motion to dismiss said action in said district court of Steele County.

Plaintiffs admit each and every allegation in paragraphs "(4)" and "(5)" of said division "H" of said answer, except plaintiffs deny that any judgment of dismissal was ever rendered, given or entered in said action formerly pending in the said district court of Steele County, and allege that the only judgment ever made, given or residered therein was and is that the plaintiffs in said action pay to the defendants therein the sunt of \$12.50 an costs and disbursements.

#### (Reply to Division "III" of said Answer)

#### 13

Plaintiffs admit each and every allegation contained in division and an action of the said surver, except that portion thereof as follows, to with and this defendant offered evidence cending to support the allegations of its said answer," which portion of said answer these plaintiffs dany for the russon that the defendants have not at any time offered any evidence tending to show that the said Crosmery Package Manufacturing Company is not an illegal trust and manopoly within both the meaning of the statutes of the United States and also those of the State of Minnesots, as said Crosmery Package Manufacturing Company is charged with being and having been even lines February 24 1898.

(Reply to Divisions "IV", "V", "VI", "VII" and "VIII" of said.
Answer)

Plaintiffs deay each and every affregation oparamen in division IV of oad answer, and each and every allegation contained in diwhen the second second

(Buty to the Amendment to and Separate Amends of said Dedeed an enterent with field in said action on its about Pobrativ 1 (000)

14

Plaintiffy daily exch and every allegation contained in said exendences to the separate answer of the defendant Creamery Pack-ter Manufacturing Company.

15.

And for further reply to said amendment plaintiffs allege that the letters patent referred to in said amendment were not and never lives been of any force, effect or validity whatsoever, and are now and as all times have been void on their face; that the so called involves described in and covered by such patents, if there are any sech, had been well known to the public and in public use for more than two years prior to the Application for said letters patent, and that a maxima built in accordance with said letters patent did not possess novelty or invention, and that all ideas and principals attempt to be covered by such letters patent were taken by the persons applying for such letters patent from other devices and inventions which had theretofore been disclosed and made known to the applicants of such letters patent.

16

And for further reply to the said answer, and to the said amendment thereto, of said Creamery Package Manufacturing Company, the plaintiffs deny that said defendant Creamery Package Manufacturing Company is or ever has been the owner of any of the letters patent mentioned or referred to in the complaint in this action, and delay that said defendant has ever been the owner of any letters patent on any combined churn and lapter worker.

LEACH & REIGARD,
Plaintiff's Attorneys,
Owatonna, Minnesota

UNITED STATES CIRCUIT COURT

D. E. Victus and the Gwatcoms Futning
Mill Computer: Plaintiffs

301.

The Greamery Parkage Manufacturing

Company

The Owstoms Manufacturing Company,

Thomas J. Howe, Frank La Bare and

Charles H. Higgs.

Defendants.

#### REPLY

TO SEPARATE ANSWER OF OWATONNA MANUFAC-TURING COMPANY.

Plaintiffs, for their reply to the separate answer of the defendant, Owstones Manufacturing Company, state and allege as follows:

Plaintiffs deny that any final decree was ever made, rendered or entered in the auit mentioned in paragraph 29 of the complaint in this action, and deny that any such decree was ever made, rendered or entered in favor of the complainant in said suit in equity, or against the plaintiffs in the above entitled action, but plaintiffs admit that an interlocutory decree was rendered in said suit in equity, a copy of which interlocutory decree is attached to said separate answer of the defendant Owatoma Manufacturing Company and marked Exhibit "A"; and plaintiffs admit that an appeal was taken by them from said interlocutory decree, which appeal was subsequently dismissed.

Plaintiffs deny that the invention referred to in the letters patent being the patent being the patent of the complaint in this action is or ever has been an infringement of any letters patent owned by the defendant creamery Package Manufacturing Company, and deny that said letters patent are or ever have been void or invalid or of so force or effect.

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the interference of the any parameter of dismissal was ever tradened, given as entered in any action in the District. Court in and the tip country of Steels, State of Minnesotz, in favor of the above monet Outstones Manufacturing Company, as is favor of the above monet Creamery Package Manufacturing Company, and injuries the philatific in the above entitled action or either of them.

Practiffs deny that and Greatners to Package. Manufacturing this try in the article mentioned in the said separate asswer of the defendant Overtrans Manufacturing Company as having been compensed in the District Court of Stocks County, Minnesota, by the plaintiff Virtue, offered synders in said action in the District than of Stocks County tending to support the allegations of in the stock in said action, for the reason that the said Creamery Package Manufacturing Company has not at any time offered any evidence tending to show that it is not or has not been un illegal trust and memorals within both the proteining of the statutes of the United States and those of the State of Minnesota.

Plaintiffs they that the obligations Dyatoons Manufecturing Company is the owner of any letters patent and deay that any of the company of the patented stricks and better patents of the patented stricks and better patents owned or controlled by said

An interest to be seen because of the second of the second

Principle deny each and every allegation contained in paragraph. We and each had every allegation contained in paragraph "V" and each had every allegation contained to paragraph "VII" and each had every allegation contained in paragraph "VIII" and each had every allegation contained in paragraph "VIII" and each and every allegation contained in paragraph "VIII" of said and each surface of the defendant Overtonia Manufacturing Company:

Plaintiffs desy that any of the letters patent mentioned for referred to in the complaint in this action are or ever have been evened by the defendant Creamery Package Manufacturing Company, and deny that said defendant has ever owned any letters patche on my combined churus and butter worker.

LEACH & RESGARD,
Printiff's Attorneys.
Constones, Mintelon

UNITED STATES CIRCUIT COURS.

DISTRICT OF MINNESOFA

First Division.

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the (Company Standard Company) though ( Note: Frink La Bire and Chiefe H. Higgs : Defendant

#### REPLY.

#### A AUSTREL OF LAIR RE

Plaintiffs, for their reply to the separate answer of the detendant, Frank La Rare, state and allege in follows:

Plaintific deny that any final decree was ever made, rendered or othered in the unit mentioned in paragraph so of the complaint in all action, and dely that any man decree was ever made, rendered at entired in the complainant in said suit is equity, or makes the plaintiff in the above entitled action, but plaintiffs admit had an interlocatory decree was rendered in said suit in equity, a copy of which secree is attached to the said separate answer of detection. Frank La Bere and marked Exhibit "A" and plaintiffs admit that an appeal was taken by their from said interlocatory decree, which was subsequently dismissed.

Praintiffs deny that the intention referred to in the letters patent Evaluate Fig. attached to the complaint in this action is or ever has been an infringement of any letters patent owned or controlled by the defendant Assantary Package Manufacturing Company, and deny that said letters patent are or ever have been void or invalid or of no brock or affect, and plaintiffs deny that any of the letters patent mentionals or referred to in the complaint in this action, or any manufacturing patent on any combined chara and batter worker, are now over have been owned by the defendant Chesmery Fackage Manufacturing Company.

Principle dealy data say of the agreements against in the cour-

Compare to the owner of any letters patent, and don't the guy of the combined charge and butter patent, and don't the guy of the combined charge and butter patent owned or controlled by said defendant; and plaintiffs steay that any agreement made between said defendant; and plaintiffs steay that any agreement made between said defendant and the Creamery Package Manufacturing Company had solvy to do with my rights under any letters patent; and plaintiffs affect that the letters patent referred to in said separate answer of the Owntowns Manufacturing Company herein as owned or controlled by said defendant are not and never have been of any force, effect or validity whatever, and are and at all times have been raid on their face; and that the said so called inventions described in secovered by said letters patent, if there are any stoh, had been well anown to the public and in public use for more than two years prior to the application for said letters patent did not possess appetity or invention, and that all kleas and principals attempted to be sovered by said latters patent were taken by the persons applying for the same from other devices and inventions which had theretofore been disclosed and made known to the applicants for such letters patent, which allegations in this paragraph the plaintiffs make only on their information and belief.

Plaintiffs deny such and every allegation contained in paragraph "IV" of said separate answer of defendant Frank La Bare; and each and every allegation contained in paragraph "V" thereot, and each and every allegation contained in paragraph "VII" thereot, and each and every allegation contained in paragraph "VII" thereot, and each and every allegation contained in paragraph "VIII" thereot.

LEACH & REIGARD,
Plaintiff & Attornoys,
Owntown Minnesota

UNITED STATES CIRCUIT COURT.
DISTRICT OF MINNESOTA.

First Division.

Charles a Marzifacturing Company, Chouse J. Hown Frank La. Bare, and

Defendants Charles to High

O CO SECON MCTION SIZ THE TORKAMEN PACKAGE PRIVER AND REST FOR PARTY TO AMOND ANSWER

On Thesday July 13th, 1909, at ten (10) o'clock in the forencon there same for hearing the motion (dated July 7th, 1909) of the de-leadant The Creamery Package Manufacturing Company for an or-ser permitting said defendant to amend its answer hearin as spec-fied in and motion. Measrs Cohen, Atwater & Shaw repeared for the defends at The Creamery Package Manufacturing Company, and Measing Later & Reigard appeared for the plaintiffs. After considchar and marke the transcate of same the coa-

#### IT IS ORDERED!

That said defendant The Creamery Package Manufacturing company is hereby granted leave to amond its answer in the respects stated in said motion by filing said amendments with the Clerk of this Court on or before July 17th, 1009; and

That the said imendments head not be verified and that the matter therein out out that the deemed at tasks without any really thereto by the plaintiffs.

Dated Inla rate was

By the Court CHARLES A. WILLARD.

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THE RESERVE

D. L. Virine and The Guntonia Painting Mill Company. Emintific

The Country Petrigs Microsofting Company, The Overtours Manufacturies Company, Thomas J. Howe, Frank La Bars and Charles H. Higgs. Defendants

#### AMENDMENT TO ANSWER OF THE CREAMERY PACK-AGE MANUFACTURING COMPANY PURSUANT TO ORDER OF COURT OF JULY 13th, 1909.

By leave of Court granted by an order date! July 13th, 1909. The Creamery Package Manufacturing Company, one of the defendanta above named, hereby amends its separate answer to the amended complaint herein as follows:—

2. By striking out at the end of paragraph "5" of subdivision "HP" the words "that said action is now pending and undetermined "in said District Court in and for said Steele County."

 By adding to said subdivision "III" a new paragraph sumbered "6" as follows:—

"6" That thereafter such proceedings were had in said action that the said cause was again tried before the Honorable Thomas S. Backhare, the judge of said Court, with a jury, on June 2d, 3d and 4th, 1900; that at the trial of said action the said plaintiff and said intervenor introduced evidence which they claim tended to support the allegations of their said complaint, and amended complaint except, the allegations thereof relating to trusts and combinations; that said cause was submitted to the jury on Juse 4th, 1909, who rendered a verdict in favor of said plaintiff and said intervenor for the sum of \$7,500; that thereafter on June 19th, 1909, this defendant mode a motion on the minutes of the judge who tried the cause that said verdict be vacated and a new trial of said action be granted, which motion is still pending and undetermined; that all proceeding in said action are duty stayed until Augst 3d, 1900; and that said action is now pending and undetermined in said District Court in and for said Steele County."

- 3. By adding to said subdivision "III" a new paragraph num bered "7" as follows:—
  - "7. That this defendant was compelled to and did employ "attorneys in the defense of said action, and paid to said attorneys are than \$1,000 for their services in defense thereof, and "that their said services in the defense of said action were resusably worth more than said sum of \$1,000."
- 4. By adding at the end of subdivision "II" of said answer a new paragraph numbered "6" as follows:—
  - "Attorneys in the defendant was compelled to and did employ attorneys in the defense of said action, and paid to said attorneys more than \$500 for their services in defense thereof, and that their services in the defense of said action were reasons—
    "hly worth more than said sum of \$500."

Dated July, 14th, 1909.

COHEN, ATWATER & SHAW,
Attorneys for Defendant
THE CREAMERY PACKAGE MANUFACTURING COMPANY.

# UNITED STATES CIRCUIT COURT. DISTRICT OF MINNESOTA.

First Division.

D. E. Virtue and The Owatonna Fanning
Mill Company.

Plaintiffs,

The Creamery Package Manufacturing Company,
The Owatonna Manufacturing Company,
Thomas J. Howe, Frank La Bare and
Charles H. Higgs,
Defendants.

ORDER ON MOTION OF THE OWATONNA MANUFAC-TURING COMPANY TO AMEND ANSWER.

On Tuesday, July 13th, 1909, at ten (10) o'clock in the forenous

there came for hearing the motion (dated July 8th, 1909) of the defendant The Owatonna Manufacturing Company for an order permitting caid defendant to amend its answer herein as specified in said motion. W. A. Sperry, Esq. appeared for the defendant The Owatonna Manufacturing Company, and Mesers. Leach & Reigard appeared for the plaintiffs. After considering said motion and the arguments of counsel thereon,—

#### IT IS ORDERED:

- z. That said denfendant The Owatonus Manufacturing Company is hereby granted leave to amend its answer in the respects stated in said motion by filing said amendments with the Clerk of this Court on or before July 17th, 1909; and
- 2. That the said amendments need not be verified and that the matter therein set out shall be deemed at issue without any reply thereto by the plaintiffs.

Dated July 13th, 1909.

By the Court: CHARLES A. WILLARD. Judge.

### UNITED STATES CIRCUIT COURT.

#### DISTRICT OF MINNESOTA.

First Division.

D. E. Virtue and The Owatonna Fanning
Mill Company, Plaintiffs,

VA.

The Creamery Package Manufacturing Company,
The Owatonna Manufacturing Company,
Thomas J. Howe, Frank La Bare and
Charles H. Higgs,
Defendants.

#### AMENDMENT.

Pursuant to the order of the Court in the above entitled action, made and entered on the 13th day of July 1909, the answer of the

defendant, The Owatonna Manufacturing Company is amended as

t. By adding to the end of survision 'H" a new paragraph to be sumbered to as follows:

That this defendant was compelled to and did employ "attorneys in the defense of said action and paid to said attorneys "more than \$3,000 for their services in the defense thereof and "that their services in the defense of said action were reasonably "worth more than said sum of \$3,000."

II. By at sing to subdivision "III" of said answer a new par-"agraph to be numbered "7" as follows:

"7. That this defendant was compelled to and did employ "attorneys in the defende of said action and paid to said attorneys "more than \$500.00 for their services and defense thereof and "that the said services in the defense of said action were reason—"ably worth more than said sum of \$500.00."

Dated July 14th, 1909.

W. A. SPERRY, Attorney for Defendant, OWATONNA MANUFACTURING CO.

#### UNITED STATES CIRCUIT COURT.



#### DISTRICT OF MINNESOTA.

First Division.

D. E. Virtue, and The Owatonna Fanning
Mill Company,
PLintiffs,

The Creamery Probage Manufacturing Company The Owatonna Manufacturing Company, Thomas J. Horze, Frank La Bare and Charles H. Higgs, Defendants

This action came on for trial before Hon, Charles A. Williard, U. S. The not Judge for the District of Minnesota, and a jury, At a result a term of the U.S. Circuit Court, in and for the above named District and Division, held at the Federal Building in the City of the court, it is an adding to the Albertanta, on the 17th day of July A. D., 1909.

Mesers, Leach & Reigard and Mr. Williamson of the firm of Williamson & Merchant, appeared for the Plaintiffs.

C. Fry appeared for the Defendants, The Creamery Package Manufacturing Company.

Mr. Sperry of the firm of Wheelock & Sperry, and Mr. A. C. Paul of the firm of Paul & Paul, appeared for Defendants Owatonna Manufacturing Co. iceny and Frank to Rate

A jury is duly empanelled and sworn.

A recess is then taken until 2 p in the same day.

The case on the part of the plaintiffs is then opened to the jury by Mr. Leach.

While Mr. Leach was opening plaintiffs, case to the jury he referred to certain matters mentioned in the complaint, arising out of a certain contract marked Exhibit "C" thereof, and described in paragraphe 23 and 24 of said complaint

Mr. Collen then and there objected to Mr. Leach making such statements to the jury, on the ground that the matters reterred to are not at issue in, or a part of this suit, but said matters constitute a separate cause of action brought, and to be tried and settled in another court.

Mr. Leach. We do not propose to attempt to recover upon this cause of action in this suit; we simply wish to show what was doneunder these circumstances by The Creamery Package Manufacturing Company, and that they were in the business of making and creating a trust, and to show how they dealt with Mr. Virtue. Of course we cannot recover any damages for a breach of that contract in this cause of action. We also propose to show that this contract was never intended to be and never was carried out by The Creamery Package Manufacturing Company.

Mr. Leach concludes his opening statement to the jury.

Mr. Reigard also makes an opening statement upon certain mat-ters contained in the complaint, especially with reference to the so called merger and the contract of February 24, 1808, which he reads in part to the jury.

Court is adjourned until 9 a. m. the next day, July 16, 19

Mr. Reigard continues his opening statement by continuing and concluding the reading of the contract of February 24, 1898.

Mr. Leach then continues his opening statement to the jury.

reads from the complaint, and makes certain statements with reference to the same.

Mr. Cohen. This is no part of the opening statement of plain

fif. I understand that the opening statement of plaintin was completed on the reading of the contract. Of course we have no objecought to argue upon the contents of these contracts.

The Court. Ves. I understood that you were opening your case I do not think it is proper for you to argue the law of the case at this time; but you should merely state what your case is

Mr. Leach. We didn't wish to be understood as having comnleted our opening.

Mr. Cohen. I object to your commenting on the contracts. This the jury should understand is merely what the plaintiff claims, but he has to establish this by proof

Mr. Leach. You will understand, gentlemen of the jury, that what I am stating now is simply why we expect to prove in the

Mr. Williamson reads to the jury certain contract contained in

Mr. Cohen. We have now had three counsel opening this case, I do not wish to appear unreasonable, but in thirty years' experience I never yet heard of a case being opened for a whole day. Whatever time is necessary for that purpose of course I do not object to it being spent but I must make the objection that there should be no arruments in this opening statement. If Mr. Williamson wants to read these papers he is entitled to read them, but not to argue this case. I do not think I am unreasonable in asking that the Court make this ruline

The Court. It is true that counsel has sometimes argued his case in this opening, but I assume that the reading of these contracts at this time will dispense with their being read later on. The opening statement is intended to show to the jury what you expect to prove, but not to argue the can

Mr. Williamson. These comracts are all admitted and their execution and the carrying of them into effect

Mr. Cohen. My objection does not go to your reading the con-tracts, but my objection goes to your arguing this case to the jury now; and I also object to three counsel opening this case. The Court: I think I will allow Mr. Williamson to proceed with

the understanding that he confine himself in the opening in taking what the plaintiff proposes to prove.

Leach concludes the opening to the jury.

Ir. Leach then states he will read certain depositions to the

Mr. Reigard: I will now offer in evidence on behalf of the plaintiffs and each of them a deposition of the plaintiffs of FRALK B. FARGO taken before Charles B. Rogers, County Judge, acting as court commissioner in and for Jefferson County, Wisconsin, on the 16th day of May 1008.

#### MR. FRANK B. FARGO, sworn, testifies as follows:-

#### Examination by Mr. Leach.

- O. Mr. Fargo, you live in Lake Mills. Wisconsin? A. Yes.
  O. You have lived there how long? A. I was born there.
  O. Lived there all your life, have you? A. Yes sir.
  O. You were formerly connected with and a stock holder of the F. B. Fargo & Co. at Lake Mills? A. I was.
  - Q. And of the F. B. Fargo & Co. of Saint Paul? A. Yes.
- Were those two separate and distinct corporations?

  I have forgotten whether they were or not. When we took ont our corporation in Minnesota we were a corporation in Wisco
- Q. A corporation in Wisconsin before you did business in Minsepte ? A. Yes sit.
- Q. As a corporation in Wisconsin, your business took place at Lake Milla? A. Yes sir.

  - It consisted of what?
    Manufacturing creamery supply goods.
  - Combination churns and butter workers? A. Yes sir. (8 A)
  - When did you start that business? 0
  - le a scull way in 1871.
  - Manufacturing business? A. Yes sir.
  - At the same location where the plant now is? A. No. (0)
  - Who was it commenced business in 1871 in a small way?
  - I was alone at that time.
  - Was your father living then? A. Yes. (6)
  - Living in Lake Mills? A. Yes.
  - Your brother, Enoch Pargo living then? A. Yes.  $\cdot$ 
    - Afterwards he became a partner in that business?
    - My brother did 7.50
  - About what year? A. I think it was about '73 or '4 00
  - The business kept increasing, kept making it larger con-0.5 tinually. A. Yes sir,
    - Q. Enlarging your plant? A. Yes sir.
- Q. Doing a larger business year by year? A. Yes.
  Q. Until you sold out to the Creamery Pkg. Mfg. Co., which we reall the Creamery Co., in about 1898, in the spring? A. Yes.

Q. About the time you sold out to them, shout what was the value of the property of the F. B. Fargo & Co., located in Lake Mills, whick you sold to them, to the Oteamery Co.?

Mr. Cohen: That is objected to as immaterial incompetent and irrelevant, because the contract shows what the parties determined as to the valuation and the judgment of this witness as to that is im-Objection overraied, Defendant excepts.

A. I think that it inventoried then about \$120,000 \$125,000.

Oher property consisted of a building and the real estate upon which it was situated and the manufactured stock in trade?

Q. You had no store in Lake Mills! A. No.

When you started manufacturing what were the first goods it manufactured? A. Alone?

Q. Yes. A. Butter coloring and butter workers,
Q. When was P. B. Fargo & Co. incorporated at Lake Mills,
Wis.! A. I don't recollect.

O. About how long before March 1808?

A. Oh, I think we had been incorporated for twenty years.

Q. During all of that time your business had been prospering. on the latter part of that period?

A. Yes.

Q. You sold goods throughout what territory up to March 1, 1808, especially the latter part of that period?

Principally is Wisconsin, Illnois, Minnesots, Iowa and Dako-

Q. You say you began manufacturing in '71' a churn and butter

A. That is, a hand butter worker.

O. When did you commence manufacturing a combined churn and botter worker!

A. Oh, shout the year 1805 I should say. I couldn't give you the coact year, but along in about that date.

Q. You remember the first churn you manufactured, combined churn and butter worker,—and sold?

A. Yes, I remember the first one we manufactured.

Q. What was the mane of that churn?

A. That was the Anderson.

That was the Anderson.

Did you sell that churn? A. Yes.

You think that was about 1895?

It might have been earlier than that.

And you continued selling that churp for how long a period?

We only made a few of those.

What was the next churn you sold on the market?

Combined them and buck of colonie

Ves, combined churn and butter worker.

A I think the Style A, machine.

Of what make was that —a Victor churn? A. No..

How long did you sail the Style A machine?

A I think for about a year? I should say about a year.

Then what combined churn and batter worker did you sell?

A At the same time we was manufacturing that machine we took up what we called our Style B. machine

Q. How long did you sell those Style B machines?

A. Well, about the same length of time, I should say.

Q. What was the next combined churn and butter worker you काति ह

A. Well, to any extent, I think it was the Victor. We were experimenting with two or three machines at that time.

Q. Can you tell about what time you commenced to manufac-

ture the Victor churns?

A. I should say it was about the year 1897 or 8.

The first Victor churn went where, into what creamery?

I couldn't say.

Q. Do you remember what time it was sold?

A. No. I couldn't tell you.

O. How long had you been working on the Victor churn, beiere the first one was manufactured and sold?

A. Oh, I should think it was a year, year and a ball, after we took out our patent on that machine before we commenced manufacturing them for the trade.

You knew of this contract of course being made in Peb.

1898? You signed that contract, did you not?

A. Yes sir.

Where did you sign it, Mr. Rango?

A. Which contract do you refer to?

Q. The contract of Feb. 24, 1808.

Reference to whom?

D. That is the contract between yourself, F. B. Fargo & Co. and the Creamery Pkg. Mfg. Co., Cornish, Curtis & Greene Mfg. Co. and C. E. Hill & Co. A. Yes, I was one of the signers of it.

OF F. B. Pargo & Co. was a party to that contract, were they not?

A. Yes.

Q. That contract provided that F. B. Fargo & Co. should transand assign over to the Creamery Package Mig. Co. certain patents and other personal property. Was that done, Mr. Pargo?

A. It was

). Do you remember of those patents being assi men Pla Mig Co.

A I be see they over assigned over to them.

C. Logether with the other property?

A Yes, they was purt of the consideration.

C. And the F. B. Fargo & Co. received what for their property of Luke Mills and the paberts signed over?

A I don't recoilect exactly, but I should say it was about 120,000,000 or \$125,000,000.

Q. And in what way did the F. B. Farge & Co. receive that?

A. Received it in stock of the Creamery Pkg. Mfg. Co.

Q. Can yell tell about what part of that was for patents and what art of it was for the rest of the business at Lake Mills?

That I don't resollect.
The patents and the other property at Lake Mills all went in rether, and for that you received that capital stock,—is that right?

A. Yes.

Was the F. B. Farge & Co. or yourself ever paid any other consideration than that for any of those patents or any of that other property. A. No. I don't think they was.

Q. And you say that those assignments were made and that stock received by F. B. Pargo & Co. within three or four months after Feb. 24, 1898?

A. It was received shortly after we sold out to them.

And at the same time that F. B. Fargo & Co. of Lake Mills wold their property, they made an assignment and transfer of their property in St. Paul to the Creamery Pkg. Mfg. Co.?

Yes sir, that was included in the transaction.

If the F. B. Fargo & Co. of St. Pattl was a separate corporazion, its property was owned by the same persons who owned the roperty here? A. Yes.

Q. Of course the property in St. Paul and the property at Lake Mills after that contract was made, was inventoried to determine its value, was it not. Mr. Fargo? A. Yes.

O. And the stock that you received from the Creamery Co. was used upon that inventory, was it not? A. Yes.

O. Do you remember the amount of the inventory of the proper in St. Paul? A. No, I do not.

O. About what proportie of the whole property?

A. It was a small amount of it. I couldn't say what proportion.

O. The property in A. Paul consisted of what, Mr. Fargo?

A. Manufactured goods.

O. Which you had there in a store for sale? A. Yes

And from that place you sent out traveling men for the sale

f those poods? A. Y

Q. Throughout the northwest? A. Yeasir Q. Minnesotz? A. Yes......

O. And you were in direct competition, were you, with the Creamery Pkg, Co, and the Cornish, Curtis & Greene Co?

Mr. Cohen: That is objected to as calling the a conclusi

Objection overruled. Defendant excepts.

A YES

O. Was that competition quite severe previous to March 1, 1808?

Mir. Cohen: The came objection as to the last-

Objection overruled. Defendant excepts.

O. Did you remain connected with the F. B. Fargo & Co. or ith that name after the sale to the Creamery Co.?

Was I with them, did you sak?

Yes. A. Yes.

O. Hold any office? A. I was one of the directors.

For how long were you a director?

A. I think for three years,

Q. Have you been with them since then? A. I have not.

O. During that time that you were director and during that aree years, were you manager of the branch at Lake Mills? A. No.

Who was? A. E. J. Fargo.

O. Were you manager at St. Paul? A. No.

Q. Who was? A. During this three years?

Yes. A. J. L. Crump.

Q. I suppose after you sold out to the Creamery Co. you person-lly had nothing to do with the house at St. Paul, did you? A. No.

Court of the conference of the survey

At the time you sold out to the Creamery Co. there was no age made in the name that was used at Lake Mills was there?

A. No change made at that time.

Q. And no change made in the name used at St. Paul?

A.No, that name wasn't changed until after I left the company.

Q. Then what was the name changed to, Mr. Fargo?

A. I think they call it the Furgo Creamery Supply House.

O. Conducted by the Creamery Pag. Mfg. Co? A. Yes.

O THE DAY OF THE PARK OF THE PARK AS THE

Consider you made the decade and the assignments and the transof the parents to the Creamery Fig. Mig. Co. in the year 1258,
only after the hold out so that company, did the h. B. Farget &
of yourself or anyone also that you know of make any other
and or assignment of they patents, or any bill of sale of any of the
reporty term siy owned by F. B. Dingo as Go. or by yourself or
anoth Pargo? A. I don't recollect of any

It was all done at once, was it, Mr. Fargo?'
Well, I couldn't say as so that. There might have been. I have that at the time we had some patents pending and they might have dragged along and might not have been signed over to them

O. Anything that was not contemplated in that contract of Feb-

O. Or anything for which there was any other consideration recoived from the Creamery Co other than that capital stock which you have already mentioned? A: That is all that I recollect of.

Q. Since you cold out to the Greamery Co. that company has

ter worker, has it? A. Yes.

Q. Mr. Gurtin testified this morning as a director of the Cream-

my Phy. Mig. Co. A. That he was a director.

He is now . A.

O. You knew of the law suit, of course, between the Greamery said. Mrg. Co. and Mrg. D. E. Virtus, and the Owstones Taiming

Mill Co., did you not, Mr. Pargo?

A. I understood that there was a law-suit between them through Mr. Virtue himself. 'I never give it any attention further than that.

Q. You knew of a law-suit between the Fargo Co. and the Own-tone Mig. Co. which was pending on March 1, 1898? A. Yes sir.

Q. Did the Fargo Co. and the Owntorna Manufacturing Co., or

the other way? A. Other way.

O. When you went into the contract of February as, 1036, the
you then know that there was a contract existing between the
Creamery Co. and the Owntouns Mig. Co.?

A. I had understood there was.

O. Did you go into that contract without looking up and knowing the terms of the contract between the Greamery Co. and the Owatonna Mig. Co.?

A. I never looked it up. I understood that there was a contract entating at the time we sold out to the Creamery Plus. Mfg. Co.

O. Were those negotiations for the sale of your property to the Greamery Plus. Mfg. Co. carried on by correspondence or were they

adversed at unsecungs held, Mr. Pargor A. Both.

Q. Did you percovally attend all of those meetings?

A. Attended all of them, I govern

Q. Where were they held?

A. Meetings were all held in Chicago.

Q. At any of those meetings did you see any of the representatives of the Chestonna Mig. Col.

A. I don't recollect of their being present there at all. They ight have been, but I don't think they were present at my of our a there

Q. Did they know what was going on did the Owatonna Mig.

Until after the contract was made? A. I don't think so,

It wasn't very ong after that contract was made that there ras a stipulation between you and the Owattonna Mig. Co. in which you agreed to a settlement of a case then pending between you?

Do you know how long after March 1, 1808, that was?

I couldn't say. 8. A.

O. The same year? A. I should say so.

Q. Did you personally conduct negotiations for that settlement? A. I was present when they were conducted.

Q. Where were they?
A. Either St. Paul or Minneapolis. I have forgotten which.

Q. Who else was there, Mr. Fargo?
A. Mr. Howe & Asses of Owatonna, Mr. Benedict of Milwaukee, Mr. Gates of Chicago, Mr. Higgs and myself, and another gentle-man from Chicago, that I don't recollect his name. He is now dead.

O. Was that meeting for the purpose of coming to noise settle at of that suit? A. Yes.

Q. And stopping Stigation? A. Yes.

O. At the time a st you held that meeting, Mr. Fargo, had there on a subsequent contract after the 1897 contract made between a Creamery Co. and the Owatooma Mig. Co.?

A. I don't understand what you mean by the 1897 contract.

O. I mean the contract between the Creamery Co, and the Ownman Mig. Co.

A I don't know when that contract was made mysel.

Q. At that meeting that you have just mentioned, the terms of he settlement of that came which was then pending were agreed to, here they? A. Yes.

Q. Bruses the Creamery Pkg. Co. acting for the Pargo Co. on se hand, and the Owatonna Mig. Co. on the other hand?

19 To Manchers to her street that I find the Transfer

as I don to think there was it that time that shortly little. The unis of the contract were all agreed upon. A have forgotten when

papers were digned

as that paper over filed in court?

I don't know, I vouldn't up, It wasn't during the time with

Dis the course appoint for vilent being interest as the ourt either one way or the other? A. I don't recollect.

Q. Do you remember the terms of that contract and agreement.

Fergo? A. Not fully.

At the time that that contract was made, were assignments made of those patients from the Owatons (Mf. Co. to the Creamers) 

Mr. Cohen ... We object to that because the answer shows that the witness had absolutely no knowledge about it, either as to the conwere made were made in writing.

The Court of Direct will allow the curve-

Obbesta citarile Demostra except

Char was the understanding that they bround be and sup-

What was the arrangement, Mr. Pargo, if there was any, a the Owatonna Co. making those churns after that sale of those patentis? Give it so you remember it.

Mr. Cohen: That is objected to as calling for the contents of a

The Courts I think I will allow the answer

The state of smile to the fame of the

As I resolved, they went to have dalf of the selling, price of

by whom were the sales to be usade of the churus?

the Greamery Pkg. Mig. Co.

O. Do you remember any clause in that contract between the Creamery Pieg. Co. and yourcelf and the Gwattenn Mfg. Co. settling that case and agreeing to assign those patents, concerning any futre patents and improvements which might be required by the

To reems to my lacte who venue in the contract your, have

Ton any limitation had a state part on your ell-

No. I prive earlies contrict that was drawn up.
I mean the adjustion setting that case.
I was there when it was all agreed to.

Bid they redvertise at all toper March to 1998, eyes the name 1 F R Ring & Co.

Mr. Cohen: That is objected to as immaterial and irrelevant. Objective overrolpi Dispanti except

A. I think we are nevery little severthan ales. We did some, not as much as usual.

Q. Was there any change made in the name used in that adver-ing? A. In the same of the firm?

Q. Yes A. The name wasn't changed until after I left.
Q. Whatever advertising of course was done after March 1st, 1808, was done by the Creamery Co.? A. I don't think it was at first.

Q. Did they advertise in the name of F. B. Pargo & Co?

Yes

Q. Whatever advertisements were made of the Lake Mills beginess by the Creamery Co., the name of F. B. Pargo & Co. was used?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. R. Walls

Q. Until after you left the company? A. Yes.

Q. About how long a time, as near as you can now tell, Mr. Fargo, were there negotiations pending looking forward to and leading up to the execution of the contract of February 24, 1898?

A About five months, I think-five, six months.

O. The date of that publication in which Exhibit II, is shown is at? A. August 28, 1897.

O. Was that about the time that you commenced to sell that harn represented in Exhibit H.? A. About the time, yet,

Q. Does that help you to determine the date you sold the first or churn?

L. Well, I should say that it was in this year - 1807.

Q. Did you hear or know anything about the contract between e Cornish, Curtis & Greene Co. and the Crommery Pkg. Mfg. Co. nd Mr. D. E. Virtue and Martin Deeg on the other hand, Mr. largo? A. I don't recollect anything about that.

Cross-Examination read by Mr. Cohen.
This \$120,000,00 or \$125,000,00 of expital stock of the Creamy Eq. turned over to the Fargo Co. was as I understand, the total makeration for both the Lake Mills plant and business and the St. aul concern? A. It was

O. From about 1895 to 1897 or 1898, your company experimented with the Anderson churn, the Style A. churn and the Style B. churn?

A. They did.

Q. Did either of those churns turn out a practical mercantile success? A. Partly so, all of them.

O. Did you continue the sale of them after you introduced the

Victor on the market?

A. No, not any of them. We dropped them all entirely, except the Victor.

Q. What was your reason for doing that if they were practical

commercial successes?

A. Well, the suit brought against us was for infringement of patents on the Style A. machine, which we had put out so many of while we were manufacturing them and there was an injunction served on us which stopped us manufacturing them.

Q. Was that part of the litigation of the Owatonna Mig. Co.?

A. Yes.

O. And the other two machines were a success and in a good many hands, but not a perfect success in all, and the Victor machine was a greater success.

A. And it has proved itself so to be today.

Q. As soon as you put the Victor machine on the market, the Owatonna Company brought suit to enjoin the sale of it?

A. No, I don't recollect there ever having been any suit against

the Victor.

Q. What was the litigation you speak of?

A. It was against the Style A. machine.

Q. While you took part in the negotiations for the settlement of that litigation, as I understand it, you never saw the final contract of settlement at all?

A. No, I-still I have a faint recollection of seeing a copy of the

contract after it was drawn up, but I wouldn't state positively.

## Re-Direct Examination.

Q. Do you remember that meetings were held at Fort Atkinson by people that were interested in the Creamery Co. concerning whether they should manufacture a churn at Fort Atkinson—a combined churn and butter worker?

A. I remember of our holding one meeting there with part of

the directors present.

Q. About when was that, Mr. Fargo?

A. Why, I should say it was the year after the making of the contract.

Q. Some time in 1899 then?

A. I should think so-yes, about that time.

Q. That was a meeting at which there were present the directors.

of the Creamery Co.?

A. There was a few of the directors present. There was a few of them present. I think Mr. Gates was there, and myself and Mr. Curtin.

O. And was it determined at that meeting that they should not

manufacture a churn at Fort Atkinson?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendanta except.

A. I think that matter was taken up. As I remember now, I think it was taken up. They were manufacturing a combined churn but I couldn't say what churn-at the time that we sold out to the company, and it was decided at that time not to manufacture any combined churns there.

Q. It was decided at that meeting held at Fort Atkinson, by the directors of the Creamery Co. that they would not in the future

manufacture any combined churn at Fort Atkinson?

Mr. Cohen: That is objected to as immaterial and irrelevant, Objection overruled. Defendants except.

A. Yes, as I remember.

As near as you can remember, that was in what year?

I should say in 1890. It was after we had sold out to the company.

Q. What directors of the Creamery Co. do you remember of be-

ing there at that time? A. I have mentioned their names.

Q. And after that time were there ever after that any combined churn and butter workers manufactured at Fort Atkinson?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. I don't shink there has been any manufactured there since.

Mr. Cohen: I move to strike out the answer.

Motion denied. Defendant excepts.

Mr. Reigard: We will now offer in evidence the deposition of S. B. House, taken at the same time and place as the deposition of F. B. Fargo last read.

Mr. Cohen: I think the jury should understand and the record should show, that these depositions are not taken in this action but were taken in other litigation, and are used in this case by stipulation, also that in some instances they were taken quite a considerable time before the commencemnt of this action.

## MR. S. B. HOUSE, sworn, testines as follows:

## Examination by Mr. Leach.

- Q. Are you a stockholder in the Creamery Package Mfg. Co.?
- A. Yes, sir.
- O. Are you an officer? A. No, sir.
- Q. Director? A. No, sir.
- Q. Are you in the employ of that company? A. Yes, Sir.
- Q. How long have you been, Mr. House? A. Ten years.
- Q. With what concern were you connected before that ten years? A. F. B. Fargo & Co.
  - Q. And you were located where? A. Lake Mills.
  - Q. What were your duties before the ten years?
  - A. Well, they were innumerable.
  - Q. Describe them in a general kind of way.
- A. Well, telegraph operator, billing-clerk, order-clerk, salesman —that is a few of them.
- Q. And did you continue in the pursuance of those duties after Feb. 24, 1808?
  - A. Well, I continued as salesman and billing clerk.
- Q. How soon did you know of that contract being made after it was made, Mr. House? A. I think it was the 1st day of March.
  - Q. From whom did you receive your information in that regard?
- A. I had a telephone message from Chicago to come down and help take inventory.
  - O. Whom was that message from? A. From Mr. E. J. Pargo.
  - Q. Enoch J. Fargo? A. Yes sir.
  - Q. Did you go down there to Chicago on that telegram?
  - A. Yessir.
  - Q. What did you do there? A. Helped take inventory.
  - Q. Of what properties? A. Stocks of goods.
  - O. Where located? A. Well, several different places.
- Q. The stock of goods formerly owned by the Creamery Pkg. Mig. Co.? A. Yes sir.
  - Q. And that owned by A. H. Barber & Co.? A. Yes air.
  - Q. Did you help take any other inventory?
  - A. At that time, do you mean?
  - Q. At any time? A. None but out own, that is all.
  - Q. Your own was at Lake Mills? A. Yes air.
- Q. When did you become a stockholder in the Creamery Pkg.
- A. Well, I don't know, I think about 1900 or 1901. I can't say
  - Q. Are there any traveling men now on the road from the Fargo

Creamery Supply House at Lake Mills? A. No sir. Q. Was there before Feb. 24, 1898? A. Yes.

When was a traveling man discontinued from that point?

A. I can't say.

Q. How many were there from that point previous to Feb. 24, 1808, at the same time-how many working together?

A. As I remember it, there were two.
Q. Traveling throughout what territory?

A. Wisconsin and Northern Illinois, and I guess Eastern Iouxa.

Q. Southern Minnesota?

A. No, these men didn't go to Minnesots, as I remember it.

Q. In addition to that, did the Fargo Co. at Lake Mills well goods through the mail? A. Oh, yes.

Q. Throughout what territory, from Lake Mills?

A. When was this?

Q. Before March 1, 1898?

A Wherever we received orders from.

Q. From Minnesota? A. Yes sir.

Q. And of course during that time you were in competition with the Creamery Pkg. Mfg. Co.?

Mr. Cohen: That is objected to as immaterial and irrelevant and as calling for a conclusion of the witness.

Objection overruled. Defendant excepts.

A. Yes.

Q. And the Cornish, Curtis & Greene Co.?

Mr. Cohen: The same objection.

Objection overruled. Defendant excepts,

A. Yes.

Q. And the Cornish, Curtis & Greene Mig. Co.?

Mr. Cohen: The same objection.

Objection overruled. Defendant excepts.

A. Yes.

Q. And C. E. Hill & Co., Kansas City?

Mr. Cohen: The same objection.

Objection overreled. Defendant excepts.

A. Yes, sir.

Q. And also A. H. Barber & Co. of Chicago?

Mr. Cohen: The same objection.

Objection overruled. Defendant excepts.

A. Yes sir.

Q. And also the Cushman Co. of Waterloo, Iowa?

Mr. Cohen: The same objection,

Objection overruled. Defendant excepts.

A. I don't think he was ever any competitor of ours.

Q. He didn't cut much figure? A. No.

Q. The main competitors were those I have just mentioned?

A. Yes.

Mr. Reigard: Counsel for plaintiffs and each of them now offer and read in evidence the deposition of HARRY H. CURTIS on behalf of the plaintiffs, and each of them.

MR. HARRY H. CURTIS, sworn, testifies as follows:— Examination by Mr. Leach.

Q. Mr. Curtis, where do you live?

A. Fort Atkinson, Wisconsin.

Q. How long have you lived there? A. All of my life time.

Q. You are now a director of the Creamery Company?

A. I am.

Q. How long have you been a director of that company?

A. Since its organization.

Q. Give us that date, if you will, please.

A. In March, 1898, I think,

Q. Wheresbouts? A. Was it organized?

Q. Yes. A. City of Chicago.

Q. Was that immediately upon and after the execution of a certain contract dated February 24, 1898? A. I think so.

Q. And you signed that contract, did you, Mr. Curtis? A. I did. Q. Who are the other directors at present of the Creamery Co.?

A. Mr. C. M. Gates, Mr. D. E. Wood, Mr. C. S. Hook, Mr. H. J. Ferris, Mr. George Walker, Mr. Charles Higgs.

Q. How long have they been directors of that company?

A. That would be difficult for me to tell you—the exact number of years that each of them have been directors. Some of them have been directors all of the time since the organization.

Q. Which ones have been since the organization?

A. Mr. Gates, Mr. Wood and Mr. Ferris, I think.

Q. About how long has Mr. C. S. Cook been a director?

A. I think three years.

Q. Whose place did he take?

- A. I wouldn't say positive, but I think Mr. Sherwin,
- Q. And was Mr. Sherwin a director from the organization of the company? A. He was.

Q. That is W. W. Sherwin, is that the name?

A. That is the name, yes sir.

- Q. Whose place did Mr. George Walter take?
- A. Mr. Robert Stoddard.
- Q. And was Mr. Stoddard a director since the organisation?
- A. He was not
- Q. Whose place did he take? A. I think Mr. George Walker's.
- Q. How long was Mr. Ralph Stoddard a director?
- A. I couldn't say positively—one or two years I think
- Q. And the balance of the time Mr. George Walker?
- A. As I remember, yes.
- Q. How long has Mr. Charles H. Higgs been a director?
- A. I can't say positively—I should estimate five or six years.
- Q. And whose place did he take? A. I don't remember.
- Q. The president of the company upon its organization was Mr. Gates? A. Yes sir.
  - Q. And he acted as such until his place was taken by Mr. Higgs?
  - A. Yes sir.
  - Q. And who was the first secretary? A George Walker, I think.
  - Q. Do you remember how long he held that office? A. I do not.
  - Q. Who succeeded him? A. H. J. Ferris, I believe.
  - Q. He is the present secretary? A. He is.
  - Q. Who was the first treasurer? A. D. E. Wood, I think.
  - Q. How long has be been treasurer?
  - A. He is still treasurer of the company.
- Q. Most of these people you have named live in Chicago or in suburbs of Chicago? A. Yes air.
  - Q. All of them? A. Mr. Wood lives in Elgin.
  - Q. Is that the only exception? A. Mr. Hook lives in Indiana.
  - Q. What are his initials? A. C. S.
  - Q. How often are meeting of the directory held-regular meetings?
  - A. Regular meetings,-I think four times a year.
  - Q. And special meetings as occasion requires? A. Yes sir.
- Q. At each of those meetings, general or special, you keep a complete record of everything that takes place? A. We do.
- Q. And those books are in the possession and control of the secretary? A. Yes sir.
- Q. And you have a complete record since the organization of the company? A. I think so.
- Q. There has been no fire or anything of that kind to destroy the records? A. Not that I know of.
- Q. And are those records made at the time of the meeting and before the meeting is adjourned are they read over?
  - A. No, they are read at the next meeting and passed on.
- Q. They are read and passed on at the next meeting and whatever corrections should be made are made at the next meeting?

A. That is true.

Q. When was the last meeting of the directory held?

A. The latter part of April.—I can't give you the date.

O. Did you attend that meeting? A. I did.

Q. Who presided at that meeting? A. Mr. Gates.
Q. Was Mr. Higgs present at that meeting? A. He was.

Q. But Mr. Gates presided in place of Mr. Higgs, did he?

A. He did.

O. How long was Mr. Higgs there at that meeting?

A. All during the meeting.

Q. About how long did the meeting last?

About an hour I think.

Q. Is Mr. Higgs up and around attending to business every day, do you know? A. I think not. He has been sick for some time.

Q. Ever confined to the house? A. No.

Q. You said the contract of February 24, 1898, was executed in Chicago? A. Yes sir, as I remember it.

Q. And you were there representing the Cornish Company?

I was.

O. And other representatives were there from all the other concerns which went into that contract at that time?

A. There was, as I remember it.

Q. Who was there from the Owatonna Mfg. Co.?

A. I don't remember.

Q. Do you remember of seeing someone there from that company?

Q. When you signed that contract you knew that there was litigation pending between F. B. Fargo & Co., and the Owntonna Mig. Co., did you not? A. Yes, I think I did, by reading about it.

Q. And you knew there was a contract then in existence between the Creamery Co. and the Owatonna Co., regarding the sale of the

churn?

A. I might have known that they had the sales agency for the churn by hearsay, but didn't know anything about the contract.

Q. Did the Cornish Company also have a contract with the Creamery Co. before this contract of Pebruary 24, 1898?

A. Did we have a contract?

Q. Yes sir. A. We might have had. I don't remember.

Q. What position did you then hold in the Cornish Co.?

A. I was president of the company.

You would certainly know of any contract that you had,

wouldn't you?

A. I don't recall. If there is any special kind of a contract,—for miles of goods do you refer to?

Q. Any kind of a contract whatever.

A. I couldn't say, I don't remember.

Q. Was the Cornish Co. on good terms with the Creamery Co. at that time?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. We were competitors, you might say on good terms. We sold them some of our goods. We were competitors though.

Mr. Cohen: I move to strike out the answer of the witness as not responsive to the question.

Motion denied. Defendant excepts.

Q. How long had you been competitors?

Mr. Cohen: I make the same objection as to the last question, and also as calling for a conclusion of the witness.

Objection overruled. Defendant excepts.

A. A number of years. I couldn't state how many.

Q. Throughout what territory?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Throughout the West.

Q. Name the states if you please, Mr. Curtis.

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Wisconsin, Minnesota, the two Dakotas, Iowa, Kansas, and Nebraska.

Q. Also in the East?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Why yes, to a certain extent. (You might say it covered the entire United States, wherever dairy goods were sold.)

Mr. Cohen: We object to the second paragraph of the answer as not responsive to the question and move to strike out the same. Motion denied. Defendant excepts.

Q. In what line of goods was that competition?

A. In dairy machinery.

Q. Churns and butter-workers? A. Vats.

Q. Also churns and butter-workers, Mr. Curtis?

A. Churns, butter-workers, cream vats, milk heaters.

Q. Previous to that contract of February 24, 1898, you were also competitors with the F. B. Fargo & Co., were you not?

A. We were.

Q. Throughout the same territory? A. Yes sir.

Q. Also in the same lines of goods? A. Yes sir.

Q. Those goods could be best described by saying that they were

dairy and creamery supply goods? A. Yes sir.

O. Such goods as are usually bought and sold by a concern in that line of business? A. Yes tir.

Q. There was at the time that contract was made a company known as the Cornish, Curtis & Greene Mig. Co. and also a company known as the Cornish, Curtis & Greene Co.? A. Yes sir.

O. The Cornish Curtis & Greene Mig Co. was a corporation of Wisconsin? A. Yes sir.

Q. Located where with respect to its place of business?

A. Fort Atkinson, Winconsin.

O. What was the general nature of that concern at Fort Atchinson?

A. We did a manufacturing business, making dairy goods, dairy

and creamery.

Q. Did you have any store at Fort Atchinson from which you sold these goods generally throughout the country, or was your busi-ness there chiefly manufacturing?

A. We did a considerable retail business besides running a mann-

facturing plant.

Q. What was the capital stock of that concern in Feb., 1898?

A. \$125,000.00, as I remember.

Q. About what part of that was invested in the manufacturing plant? A. Most of it.

O. And the Cornish, Cartis & Greene Co. was located where?

A. St. Paul. Minnesota.

O. What was the capital invested by that concern in its business in St. Paul in February, 1898?

A. I don't remember, but I think \$12,000.00.

O. Consisting of what line of goods?

A. Mostly a stock of dairy machinery that they carried in St. Paul.

Q. You were selling from St. Paul, or that concern was, from that house there, through what territory in February, 1898, and previous to that time?

A. They could sell any place.

Q. Where did they sell, as a matter of fact?

A. Largely in the Dakotas and Minnesota.

O. In direct competition with what concerns, Mr. Curtis?

Mr. Cohen: Objected to as immaterial and irrelevant and as calling for a conclusion of the witness. Objection overruled. Defendant excert.

A. Well, the Creamery Package Co., Fargo, Vermont Farm-Machine Co., D. H. Burroughs & Co. There might have been a number Seriners that I don't recall.

Q. D. H. Burroughs didn't transact much business in Minnesott prior to February 24, 1898, did they? A. I don't know how much.

Q. Where was their principal place of business?

Little Falls, N. Y.

They had no selling house west of that place?

I think not.

Where was the Vermont Farm Machinery Co. konted?

Bellow Falls, Vermont.

They had no place of business west of that place, did they?

Q. In Pebruary, 1898, you had traveling men on the road from your house in St. Paul? A. We did.

Q. How many? A. I can't say.

Q. And had had for some time previous? A. We had.

Q. Was the Cornish, Curtis & Green Co. and the Cornish, Curtis & Green Mig. Co. two different and distinct corporations?

A. They were.

Q. Was any of the stock of one held by either of the others?

A. I don't remember about that.

O. Were the stockholders in the two concerns the same persons largely? A. I think so.

O. What position did you hold previous to February, 1898, in the

Cornish, Curtis & Greene Co.?

A. I don't think I was ever an officer of that company. I don't remember.

Q. Do you remember who the officers were in February, 1898?

A. I do not

Q. Where was the business of that concern managed and conducted,-from what place? A. St. Paul.

Q. Who was the manager? A. J. H. Cornish.

Q. He was of course an officer and director, was he not?

A. Yes sir.

Q. Where is Mr. Cornish now? A. I don't know.

Q. Do you ever hear from him? A. I do not.

Q. Was the competition quite sharp between those concerns previous to February 24, 1898?

Mr. Cohen: That is objected to as calling for a conclusion of the witness. Objection overruled. Defendant excepts.

A. I think so.

Q. That is, that competition which was between the concerns which you have named. I suppose there was no competition of course between the Cornish, Curtis & Greene Mig. Co., and the Cornish, Curti & Greene Co.? A. No.

O. Whatever competition there was very between those different process which were selling creaming and dairy supplies, and which were not owned by the same persons? A. That is correct.

O. Did you have considerable to do yourself personally with the contactions leading up to the making of that contact of February 24, 1937 A. I did not.

Who from your firm practically conducted these?

O. Is that S. S. Swasey? A. That is right.
O. Where is he now? A. De Kaib, Ill.

O. What position did he hold in the Cornish, Curtis & Greene Mig.

Q. In February, 1898. A. Treaturer. Q. Also a director? A. Yes sir.

O. You knew those negotiations taking place at the time?

A I did.

Q. Did Mr. J. H. Corning have much to do with them?

A. He die aus

Q. Were they done by correspondence, letter writing or by costings? A. By meetings, as I remember.

Q. Where were those meeting held? A. Chicago.
Q. Looking back from now, to the best of your memory, Mr. Cartis, about how long would you say those negotiations were pending and were being conducted between anybody prior to the making of that contract of February, 1898?

A. I should say three, four months.

Q. Had there been any previous attempts to do anything of that and? A. Not that I remember of.

Q. Anybody in Kansas City?

A. Creamery Package had a branch house there, as I remember.

Q. I find that that contract of February 24, 1898, was signed by all those persons and corporations named therein as parties to it on or about that date. A. Correct

O. After the signing of that contract, directly steps were taken

to out its terms and conditions into effect, were they not?

A. Yes sir.

Q. Do you know Mr. F. J. Mac Nigh? A. Yes sir. Q. He told us day before yesterday, Mr. Curtis, that since the date of the execution of that contract, all the terms, stipulations, presented and provisions stated in that contract have been carried and performed by the persons and corporations maned therein parties to it, to the best of his knowledge. What do you say in the contract is to your knowledge as to that, excepting the section which rovided for the execution of the bonds?

Mr. Colon. That is objected to an immiteral and irrelevant. Objection overriled. Defeating extent.

A. I think they have been.

O. You also say that that contract, with the exception of the hand, was fully carried out and performed by the parties to it, do you Mr. Cartis, to the best of your judgment and knowledge?

A. To the best of my memory.

O. Were you on any committee to carry out the provisions of that contract and securing the execution of the papers mentioned therein, and the transfers of the property? A. I don't remember.

O. You of course know what was being done? A. Thoughs I did.

C. Were you kept in the dark at all. Mr. Curtis?

A. Never thought so.

Q Never thought so since? A. No sir.

Q. Have you a copy of that contract? A. I think I have.

Q. Signed by some of the parties to h) A. I think so.

Q. Have you that here? A. I had not

Q. After that contract was signed, what was done by the Cornish, Curtis & Greene Co. towards carrying out its provisious?

A. I don't remember about the details. I suppose we carried out

our part of the agreement

Q. Did the Cornish, Curtis & Green Mfg. Co. or the Cornish, Curtis & Greene Co., when they made that contract, have or own any patents? A. We did.

Can you give us a list of those? A Cannot

Q. How many were there? A. I can't say.

Q. What were they on? A. Different dairy machinery.

Q. Tell the machines. A. I can't do that without looking it up.

Q. Were those patents owned by the Cornish, Curtis & Greene Co.? or the Cornish, Cartis & Greene Mig. Co?

A. By the Cernish, Curtis & Greene Mig. Co.

O. Were the e any held or owned by the Cornish, Curtis & Greene CAF

A. There might have been. I don't remember.

Q. Do you remember of any one? A. No.

Q. Did the Cornish, Curtis & Greene Mfg. Co. at that time have a farm near here, or a tract of land?

A. They owned a tract of land.

Q. That didn't go into that contract? A. It did not.

Q. After that contract was made, was there an inventory taken of the property of the Cornish, Curtis & Greene Mfg. Co.?

A. Yes air.

Q. Wise took that inventory? A. I don't remember.

O. Do ye — comber who represented the Creamery Plag. Co. in the taking of that inventory? A. I don't.

O. That inventory included all the property of the Cornish, Carrie & Greene Mily, Co., excepting that piece of land, did is not?

a state of

Was there likewise an inventory taken of all the property of the Cornish, Curtis & Greene Co. of St. Paul? A. I think so.

O. There was no land in that inventory, was there?

I think not

Q. And no patents so far as you can now remember?

A. I don't remember about the patents.

Q. And at the taking of that inventory, or subsequent thereto, vere assignments made, bills of sale, of deeds of conveyance, by the Cornish, Curtis & Greene Mfg. Co. and by the Cornish, Curtis & Greene Co., transferring to the Creamery Co. all the property of those first and second named concerns, excepting that real property?

A. I think so, yes sir.

O. And also assignments of patents? A. Yes sir.

Q. What was the consideration received or paid by the Creamery Co. to the Cornish, Curtis & Greene Co. for those transfers, as near as you can now remember?

A. I don't remember what it was.

Q. You can give us some idea, Mr. Curtis?

A. It would simply be guess work on my part, and I prefer not to guess.

Q. It was over \$10,000,00 of course?

A. As I remember it was, yes.

Q. And what was the amount paid by the Creamery Co. to the Cornish, Curtis & Greene Mfg. Co., as near as you can tell?

A. I don't remember about that either.

Q. That must have been over \$10,000.00? A. I think so, yes.

Q. Have you duplicates of those assignments and bills of sale, whatever they were? A. I think not.

Q. They were all delivered over to the Creamery Co.?

A. They were.

Q. In what way did the Cornish, Curtis & Greene Co. of St. Paul receive pay? A. In stock.

Q. In the capital stock of the Creamery Co.? A. That is correct.

Q. And subsequent to that time the Cornish, Curtis & Greene Oo. of St. Paul dissolved their corporate existence, did they not?

A. I think they did, yes.

Q. After February 24, 1898, and after those assignments were the business of the Cornish, Curtis & Greene Mfg. Co. here, at the business of the Cornich, Curtis & Greene Co. of St. Paul was carried on and conducted and managed by the Creamery Co.?

A. Yes sir.

Q. And used the same names as those concerns had formerly used before the contract of February 24, 1898? A. Yes sir.

Q. And for how long a time after that did the Creamery Co. continue to use the name of the Cornish, Curtis & Greene Mfg. Co. in the conduct of that business at Fort Atkinson?

A. It is still running under that name.

Q. They have been using that name right along ever since, have they, Mr. Curtis? A. Yes sir.

Q. And how long did the Creamery Co. likewise continue to use the name of the Cornish, Curtis & Greene Co. of St. Paul in running and conducting that house there, after the contract of February 24, 1808?

A. I don't remember the length of time, but until the company was dissolved, I think.

Q. Can you remember what time the creamery house closed at St. Paul, formerly known as the Cornish, Curtis & Greene Co.?

A. I cannot.

Q. Was it the present century or was it the last century?

A. I don't think they ran more than a year.

Q. If they did run more than a year, it was a very short time, was it not? A. It was a very short time.

By Mr. Atwater:

Q. A year after 1898 you mean? A. Yes sir.

By Mr. Leach:

Q. And when they closed that house at St. Paul, what did they do with what property they had on hand at that place?

A. I don't remember.

Q. Since that contract of February 24, 1898 and since that purchase, by the Creamery Co., the Creamery Co. has been running and conducting the business of F. B. Fargo & Co. at Lake Mills and also the business of F. B. Fargo & Co. in St. Paul? A. Yes sir.

Q. Mr. F. B. Fargo remained for a time with the F. B. Fargo &

Co., did he not? A. As I remember, he did.

Q. But how long a time did the Creamery Co. conduct those two places of business under the name of F. B. Fargo & Co.?

A. I don't remember.

Q. Was it ever changed? A. Yes, it was.

Q. Changed to what name? A. Fargo Creamery Supply House.

Q. And ever since that change, has the Creamery Co. been conducting those two branches under the name of the Fargo Creamery Supply House at those two places? A. Yes sir. Q. And still are, are they? A. Yes sir.

Q. Do you remember the occasion for the change of the name?

A. I do not

Q. From F. B. Fargo & Co. to the Fargo Creamery Supply House?

Q. Was there some difficulty between F. B. Fargo and the Creamery Co.? A. I don't know.

Q. But Mr. Frank B. Fargo went out of the company, did he not, or was be ever in? A. Was he ever in the Creamery Co.?

O. Yes? A. He was.

Q. Is he in now? A. I don't know.

O. He is not an officer now? A. No sir.

O. Was he ever an officer? A. He was.

Q. Do you know the amount paid by the Creamery Co. to the F. B. Fargo & Co. for their property? A. I do not.

Q. Are you quite conversant, Mr. Curtis, with the deals and contracts which the Creamery Co. has made in late years?

A. I know something about them, yes sir.

Q. Is there any contract existing now between D. H. Burroughs

& Co. and the Creamery Co? A. Not that I know of.

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

Q. You don't know of any contract between these two concerns?

A. They may have contracts for the sales of certain dairy preparations. I am not familiar with them.

Q. This D. H. Burroughs & Co. transact a business of selling creamery supplies? A. They do.

Mr. Cohen: I understand it to be a fact that wherever Burroughs is mentioned, D. H. Burroughs or D. H. Burroughs & Co. it should be Burrell.

Q. Do they cover the same territory covered by the Creamery Co?

A. They do.

Q. In the same line of goods? A. Yes sir.

Q. You say there is competition now in that line of goods between those two concerns? A. Yes sir.

Q. And you say there is no selling agreement between those two concerns? A. Not that I know of.

Q. The Creamery Co. of course has traveling men on the road?

A. They have.

Q. Does the D. H. Burroughs Co. have traveling men on the road?

A. I think so.

Q. In this part of the country?

A. I don't know positively about it.

Q. Isn't there any division of territory between the Creamery Co. and the D. H. Burroughs men now? A. Not that I know of.

Q. As to where their men shall travel and where the Creamery Co.

men shall travel? A. Not that I know of.

Q. Are the relations between the two companies friendly or are they hostile, Mr. Curtis?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Why, I suppose friendly. We deal back and forth.

Q. Do you know what occasions that friendly feeling between the two Companies?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Why, people who have purchased goods from each other during a number of years generally have a friendly feeling.

Q. Do you know of a house and place of business at Waterloo,

Iowa, conducted by A. J. Cushman?

A. I used to know of such a firm.

Q. Was that a corporation or partnership? A. I don't know.

Q. What became of that concern, Mr. Curtis?

A. I don't remember.

Q. What became of the goods and property of that concern?

A. I don't know that.

Q. Was that concern in competition with the Creamery Package Co. at any time? A. I think so, at one time.

Q. Was the property and business of that concern bought out by

the Creamery Co.? A. I don't remember about it.

Q. You have no memory in regard to that at all? Is that right?

A. I have a faint recollection that it was bought out by the Creamery Package Co.

Q. And the business managed and conducted by the Creamery Co.

or closed out? A. It was closed out I think.

Q. Now, can you tell us what time that was? A. I can't say.

Q. Was that this century or the last century? A. I can't say.
Q. Did you know of a concern of Cook & Reed of Des Moines,
Iowa? A. I think I did know of such a concern.

Q. Were they purchased out by the Creamery Co.?

A. I don't know about hat.

Q. I suppose the minutes of the Creamery Co. would show, would they not? A. I presume so.

Q. Do you know anything about the purchase by the Creamery Co.

of the Fremont Butter-Tub Co. of Rock Island, Ill.?

A. No sir, I don't know about that.

Q. Did you ever hear of it? A. I have.

Q. Who from?

A. Different people connected with the Creamery Co.

Q. Higgs?

A. I can't say positively that I have heard him say anything about it.

O. Any director of the Creamery Co.? A. Possibly.

Q. The property purchased on that deal by the Creamery Co. was taken in the name of Mr. LicBroom as trustee, was it not?

A. I don't know about that.

Q. Did you ever hear about that?

A. I don't think I ever did.

Q. Did you know of the purchase by the Creamery Co. of the property and business, or part of it, of the Sturgis, Cornish & Burn Co.?

A. Did I know about the purchase?

Q. Yes sir. A. Yes sir.

Q. What kind of goods were there included in that purchase, Mr. Curtis? A. Cream ripeners and other dairy supplies.

Q. Cream ripeners are a patented article? A. Yes sir.

Q. When was that deal made, about?

A. I should say about five years ago-four years ago.

Q. The Creamery Co. purchased the dairy and supply goods of that concern, did it not? A. Yes sir.

Q. And closed out that business of that concern in that line?

A. Well, they took these goods from them. The concern kept on doing business as I understand it.

Q. After that purchase, what business did the Sturgis, Cornish & Burn Co. conduct?

A. They sold milk cans and I think advertised some other dairy machinery, such as pastuerizers.

O. In selling those goods, did it act as agent for the Creamery Co?

A. I think not.

Q. Did the Creamery Co. sell that same kind of goods? A. It did.

Q. Was there any division of profits between the two concerns after that time? A. I think not.

Q. What was the object of the Creamery Co. in purchasing out a part of the business of the Sturgis, Cornish & Burn Co.?

A. I think to do away with certain patent litigation.

Q. Wasn't it also to do away with certain competition, Mr. Cuc-

Q. That litigation you speak of was a suit brought by the Creamery Co. against the Sturgis, Cornish & Burn Co.?

A. The other way, as I remember it.

Q. The plaintiff claimed that the Creamery Co. were infringing on

some of its patents, did it? A. I think that was it.

Q. Do you know anything about the Creamery Co. now owning the capital stock or a portion of the De Laval Dairy Supply Co. of San Francisco?

A. I know they are interested in a supply company there.

Q. By holding the stock of that company?

A. I can't tell in just what way.

Q. Does the Creamery Co. control that company?

A. I think not.

Q. Is there competition now between the two concerns? A. No.

Q. Did you know of the purchase by the Creamery Co. of the property and business of E. W. Ward & Co. of St. Paul, Minnesota?

A. Not until after it was all made.

Q. About what year was that made—the purchase?

A. As I remember it, two or three years ago.

Q. The E. W. Ward & Co. of St. Paul conducted a business of selling dairy and creamery supplies, did they not? A. Yes sir.

Q. And after the purchase of that business and property by the Creamery Co., the Creamery Co. continued to conduct that business under the name of E. W. Ward & Co. for a time, did they not?

A. I don't know about that.

Q. At the time of and before that purchase there was of course competition between E. W. Ward & Co. and the Creamery Package Co., was there not? A. I think so.

Q. And some time after that purchase the Creamery Co. closed up that place of business and discontinued doing any further business there, did they not? A. I think so.

Q. That was done, was it not, Mr. Curtis, to shut off competition between those two concerns?

A. Why, I had understood that Ward & Co. were anxious to sell

Q. Was it crowded pretty hard by the Creamery Co. in a business way?

Mr. Cohen: That is objected to as immaterial and irrelevant and as calling for a conclusion of the witness.

Objection overruled. Defendant excepts.

A. I presume so, being competitors.

Mr. Cohen: I move to strike out the words "being competitors."

Motion denied. Defendant excepts.

Q. At the time of the making of that contract of course the Creamery Co. purchased out the dairy and supply business of A. H. Barber & Co. You knew of that, did you not? A. I did.

Q. Was that purchasing done, Mr. Curtis, to quiet the competition between those two concerns? A. What two concerns?

Q. A. H. Barber & Co. and the Creamery Package Manufacturing

Co. A. They entered into the original agreement.

Q. That was really the purchase of it, was it not, Mr. Curtis?

To a certain extent. A

Q. Did the Cornish, Curtis & Greene Mfg. Co. have traveling men on the road from this place before they went into that contract of February 24th, 1898? A. They did.

O. About how many? A. One.

- O. Was he continued after that contract was made? A. He was.
- Q. After that contract was made, who was the manager here for the Cornish, Curtis & Greene Mfg. Co.?

A. I am manager at the present time.

Q. How long have you held that position, Mr. Curtis?

A. Since the company was organized.

You still maintain that one traveling man on the road? O.

We do. A.

Q. You receive, of course, all your instructions as to prices and as to the conduct of the business from the Creamery Co. at Chicago, do you not? A. We do.

Q. Those come in the form of written instructions? A. Yes.

Throughout what territory is that traveling man, and has he been traveling since March 1, 1898? A. Wisconsin.

Q. Any other territory? A. Only on special occasions.

Q. On special occasions where does he go?

A. Why, he might go into some other state, Illinois, Iowa, but as a rule he travels in Wisconsin.

Q. Does he travel some in Minnesota? A. Very litle if any.

Q. And of course the Creamery Co. has traveling men sent out from other branches and places of business situated in different parts of the country? A. Yes sir.

Q. Has traveling men from the Fargo Creamery Supply House at

St. Paul? A. Yes sir.

Is the Creamery Co. still doing business at Kansas City?

A. Yes sir.

- Q. Does it have traveling men out from there? A. Yes sir.
- Q. Are those traveling men consigned to the same territory or does each man have a different territory?

A. Different men from the same house?

Q. No, different men from different houses, do they cover the same territory?

A. They might, but they probably have different territories.

Q. But occasionally they over-lap? A. They might over-lap.

Q. And both get after the same job, putting in creamery supplies at the same creamery? A. Not very often, I think.

Q. That of course is a contingency which is provided for before-

A. Why yes, we regulate their territory.

O. If your man from here should meet a traveling man from the Fargo Creamery Supply House and they should both go after the same job or same deal of selling supplies to some creamery, and should both be on the same ground, how do they do it? Do they draw lots to see who shall make the sale?

A. That would probably be regulated from the branch that they were traveling from, I think, or perhaps the main office in Chicago.

Q. Do they not have written instructions now covering their conduct in case that should happen, in case two traveling men should meet in that way?

A. There may be instructions along that line. I don't know what

they are.

Q. But the intention and calculation of the Creamery Co. is to keep these traveling men within different territory, is it?

A. That is right.

Q. So that they will not both bid on the same contract?

A. That is right.

Q. All the traveling men of all the different houses of the Creamery Co. have been of course under the instruction and control of the Creamery Co. since March, 1898? A. Yes sir, indirectly.

Q. What you mean by indirectly is that the instructions would be sent to yourself for instance, to be sent out to the traveling men from here and the instructions to the traveling man from the house at St. Paul would be sent to the manager of the house up there and sent to the traveling men from that house? A. That is correct.

Q. And are those instructions usually printed or written?

A. In the form of a letter.

Q. Circular?

A. I don't recollect having seen any printed circulars.

Q. Type-written circular, which might be called a letter?

A. Yes sir.

Q. Those instructions and circulars of course all come from the Creamery Co. of Chicago? A. Yes sir.

Q. And to the manager, is that what you call your position?

A. Yes sir, branch manager.

Q. And the manager simply received those instructions and forwards them to the traveling men? A. Yes sir.

Q. Did you know of an action brought by the Creamery Co. against D. E. Virtue and the Owatonna Fanning Mill Co. over certain

patents? A. I might have heard about it, yes.

Q. You knew those two cases were started at the same time, or about the same time, Mr. Curtis? A. I think so.

Q. And the same attorney was employed to prosecute both cases, you knew that? A. No, I didn't know that.

Q. Did you attend a meeting of the board of directors of the Creamery Co. before the bringing of those two suits, at which the matter of those two suits was discussed?

A. I don't remember about it; they might have been, but I don't remember now.

Q. Did you ever see the minutes and records of the Creamery Co. in regard to those two suits?

A. Never have had occasion to look at the minutes.

Q. You never attended any meeting then in which the matter of those two suits was brought up or discussed before the suits were started? A. I might have.

Q. What was the object of those suits, Mr. Cartis?

A. I am not very familiar with that part of the business. I couldn't

Q. You knew at the time the contract of Feb. 24, 1898 was made that there was litigation pending between the Owatonna Mfg. Co. and F. B. Fargo & Co., did you not? A. I think I did, yes.

Q. And you knew that there was a contract then in existence between the Owatonna Mfg. Co. and the Creamery Co.?

A. For the sales of their churns, a selling contract.

Q. I think so, yes.

A. Yes, I might have known about that from hearsay.

Q. Was the matter of the effect the contract of March 24, 1898 would have on the Owatonna Mfg. Co. and on the contract between the Owatonna Mfg. Co. and the Creamery Co. brought up or discussed by the Creamery Co. and considered at any time previous to the signing of that contract of Feb. 24, 1898? A. I don't remember about it.

Q. You don't know of the Owatonna Mfg. Co. cutting any figure or having any thing to say in the execution of that contract of Feb.

24, 1898? A. I don't remember about that.

Q. You knew of a certain contract made between the Cornish, Curtis & Greene Mfg. Co. and the Creamery Package Manufacturing Company, D. E. Virtue and Martin Deeg of Owstonna, sometime in 1900, or about that time?

Mr. Cohen: Objected to as immaterial, incompetent and irrelevant on the ground that the allegations in the complaint as to that contract are immaterial, and that the issues as to that contract should not be tried in this case, because the issues with regard to that contract are the subject of another matter in litigation in the state court.

Mr Leach: We think it stands on the same plane with the action we have here; that contracts between the Creamery Package Manufacturing Company and the Disbrow Company, and the early contract between the Disbrow and the Owatonna Company were simply one of the steps which were taken by the defendant in securing the control of these churns and keeping them off the market. We allege that such conspiracy existed and that such was the purpose of it, to secure the combination and keep that churn and other churns off the market. This is denied in the answer, and we can only prove it by showing the course of events through all these years beginning with 1807; by showing that the different transactions which were made and had between the Creamery Package Manufacturing Company and this and other concerns in the same line of business. This is one step in that direction, and for that reason we think it is material in this case. We expect to have testimony going to show that after the Cornish, Curtis & Greene Co., contract of 1900 they did not fulfill it in good faith, but they made a prima facie showing of trying to fulfill it, and then put the machine away in a barn and refused to have anything more to the Owatonna Mfg. Co. whereby the Creamery Company agreed to sell a certain per cent of the Disbrow churns made by the Owatonna Co.-Is that right? A. I think so.

Q(325). What other combined churn and butter worker was the

Creamery Co. selling at that time?

Mr. Cohen. We make the same objection to that as immaterial and irrelevant, and as apparently having relation to that contract Exhibit "C."

The Court: I will overrule the objection to this question.

Counsel for defendants excepts to the ruling.

A. The Victor churn.

Q(326). Who was manufacturing that churn in 1900,—the Creamery Co? A. Yes sir.

Q(327). Where? A. Lake Mills, I think.

Q(328). The Cornish, Curtis & Greene Mfg. Co., at that time being owned entirely by the Creamery Co. and having nothing to say about the conduct of that busines, excepting to obey instructions from the Creamery Co., and having no separate existence, except in name, from the Creamery Co., how did the Cornish, Curtis & Green Mfg. Co. expect to carry out and perform the terms of that contract between D. E. Virtue and Martin Deeg, according to the terms of that contract?

Mr. Cohen: I object to that question as immaterial and irrelevant. The Court sustains the objection, and counsel for plaintiffs except to

the ruling.

O(300). It is a fact, is it not, that at that time the Cornish, Curtis & Greene Mfg. Co. was owned by the Creamery Co., and that it had do with it. We claim this was done simply for the purpose of keeping Mr. Virtue off the market.

The Court. Isn't there a vast difference between this contract of 1900 between Mr. Virtue and the Cornish, Curtis & Greene Mfg. Co., and all these other contracts, namely, that you allege in this complaint that all these other contracts were void except this one. I understand that you claim that this present contract of 1900 between Virtue and Deeg on one hand, and the Cornish, Curtis & Greene Mfg. Co., on the other hand was and is a valid and binding contract, while you claim that all the other contracts were void; that all these contracts are void, except Exhibit "C", of the complaint.

Mr. Leach. In paragraph 55 of the complaint we set out our claims as to these contracts and agreements, and we said "That all contracts and agreements attached as exhibits to this complaint, and all contracts, assignments of patent, agreements, bills of sale, transfers of property by assignment, and all other documents, papers and records, set up or referred to in this complaint or attached as exhibits thereto, and which have been made or executed by or at the instance or request of said Creamery Package Manufacturing Company as one of the parties thereto, except alone the contract hereto attached and marked Exhibit "C", as to the plaintiff Virtue, are and at all times have been wholly null and void, contrary to law and public policy." We claim it was never void as to Mr. Virtue, but it was void as to the Creamery Package Manufacturing Company, on account of the circumstances.

Also in paragraph 24 of the complaint we say "That the parties of the second part in and to said contract never expected or intended to carry out or perform the conditions or things mentioned in said contract by them to be done and performed, but they secured the execution of said contract only for the purpose of preventing these plaintiffs from manufacturing the combined churn and butter worker mentioned in said contract under the patent referred to therein, No. 364,074, and for the purpose of keeping said combined churn and butter worker off the market." Also in paragraph 51 of the complaint we set up that all the acts of the defendants set up in the complaint were done and performed in pursuance of a scheme and conspiracy to secure to themselves a monopoly of the business of seling these creamery supplies throughout the United States and to drive all other persons out of business, including Mr. Virtue, and that they did during 1897 and 1806 create a trust and combination to that

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Now we think that this would place Mr. Virtue in a position whereby he could enforce the contract as against the Creamery Package Manufacturing Company, if he saw fit; but it would not make the act of the Creamery Package Manufacturing Company any more legal though Mr. Virtue was able to enforce the contract against them. We think these two positions are not inconsistent. We think the contract could be enforceable by Mr. Virtue against the Creamery Package Manufacturing Company, and yet that contract could not have been legally entered into by that company.

The Court. You claim no damages or right to recover them, by reason of that contract Exhibit "C?"

Mr. Leach. We seek to recover no damages by reason of that contract.

The Court. I think I will sustain the objection to that question, on the general ground or the broad ground that the evidence with reference to that contract and what was done under it, is not competent on the trial of this case.

Counsel for plaintiff excepts to the ruling of the Court.

Q. Didn't you personally sign that contract?

Mr. Cohen: The same objection.

Objection sustained. Plaintiffs except.

Q. Who was it that signed the contract, acting for the Cornish, Curtis & Greene Mfg. Co.?

Mr. Cohen: The same objection.

Objection sustained. Plaintiffs except.

Mr. Reigard. There are some 15 or 20 questions that refer to this same subject.

The Court. It may be understood that the same ruling refers to all these questions that relate to Exhibit "C", and as to evidence with reference to that contract and what was done under it, and the same is ruled out, it being the contract between the Cornish, Curtis & Greene Mfg. Co., and the Creamery Package Manufacturing Company on one hand, and the plaintiff Virtue and Martin Deeg on the other hand.

Mr. Leach. Owing to the ruling of the Court with reference to the questions in the deposition relating to this contract, may it be considered that these questions are offered and objection made to them, that the objection is sustained, and the plaintiffs have an exception?

The Court. Yes, there will be the same ruling as to them, and an exception will be granted.

Mr. Leach. Then questions 318, 319, 320, 321, 322, and 323

are offered in evidence and objected to by defendants, to which the same ruling is made as to interrogatories 315 and 316; that is correct, I believe, your Honor.

The Court. Yes, that is correct. I understand that all these questions relate to this contract of 1900.

Mr. Cohen. Yes sir.

Q(318). Did you talk the matter of that contract over with Swasey before it was signed?

Q(319). Did you talk with Mr. Virtue or Mr. Deeg about it?

Q(320). Who signed that contract on behalf of the Creamery Co.?

(321). Did you know at that time that negotiations were pending for that contract before that contract was made?

Q(322). That contract provided for the construction of a certain

churn, Mr. Curtis, did it?

Q(323). The Owatonna Manufacturing Company, did they know anything about that contract or about a purchase contract of that kind before it was made?

Q(324). At that time the Creamery Company had a contract with no separate existence from the Creamery Co., except in name? Is

that right?

Mr. Cohen: I object to that, as it seems to relate to this same contract, and also questions 330 and 331, and down to Q354, as relating to this Exhibit "C".

Mr. Reigard: Plaintiffs now offer to read questions 329, 330, 331 and 332 inclusive.

The Court: These all relate to Exhibit "C"?

Mr. Reigard: To a greater or less extent.

Mr. Cohen: We make the same objection, that they relate to Exhibit "C".

The Court: I will make the same ruling.

Mr. Cohen: Except that we think that perhaps question 330 may stand upon its own basis.

The Court: I do not intend to rule out anything except what relates to Exhibit "C." If you have anything that relates to other features of the case I would like to have you call my attention to it.

Mr. Cohen: With regard to 330 we have no objection.

O(329). It is a fact, is it not, that at that time the Cornish, Curtis a Greene Mfg. Co. was owned by the Creamery Co., and that it had so separate existence from the Creamery Co., except in name? Is that right? A. That is correct.

Q(330). And it had nothing to do with the conduct of the business in that name, excepting to obey instructions of the Creamery

Co.? Is that right? A. That is correct. .

Q. How could the Cornish, Curtis & Greene Mfg. Co. expect to carry out the terms of that contract with Mr. Virtue and Mr. Deeg providing for the manufacture and sale by the Cornish, Curtis & Greene Mfg. Co. of a churn upon which Mr. Deeg and Virtue had a patent. in competition with the Creamery Co.?

Mr. Cohen: That is objected to as immaterial and incompetent. Objection sustained. Plaintiffs except.

O. Well, the Cornish, Curtis & Greene Mfg. Co. at that time would not have been able to earry out a contract between it and D. E. Virtue and Martin Deeg providing for the manufacture and sale of a churn under patents held by D. E. Virtue and Martin Deeg in competition with the Creamery Co., would it?

Mr. Cohen: That is objected to as immaterial and incompetent. Objection sustained. Plaintiffs except.

Q. You understand the question?

Mr. Cohen: Objected to as immaterial and incompetent.

Objection sustained. Plaintiffs except.

Q. What do you mean when you say you can't answer that question?

Mr. Cohen: That is objected to as immaterial and incompetent. Objection sustained. Plaintiffs except.

Q. You don't know of any reason why the Cornish, Curtis & Greene Mfg. Co. couldn't manufacture and sell a combined churn and butter worker in competition with the Creamery Mfg. Co.. Is that right?

Mr. Cohen: We object to that as immaterial and irrelevant. Objection overruled. Defendants except.

A. That is right.

Q. How could they do it, Mr. Curtis, when they were owned and wholly under the control of the Creamery Co.?

Mr. Cohen: Objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Well, this contract that you refer to-

Q. Confine yourself to the question if you will. You said they could do it. Now tell us how they could do it. You said you didn't see any reason why they couldn't do it.

Mr. Cohen: Objected to as immaterial and irrelevant.

Objection overruled. Defendants except."

A. It takes some thought to outline that, because I don't recol-

lect all of the facts about this contract.

Q. After that contract was made, Mr. Curtis, with Mr. Deeg and Mr. Virtue, if it had been carried out and part of the churns made and sold after that contract it would have materially affected and injured the Owatonna Mfg. Co., would it not?

Mr. Cohen: Objected to as immaterial and irrelevant, and as calling for a conclusion of the witness.

Objection sustained. Plaintiffs except.

Q. And do you know of the fact of the Owatonna Manufacturing Company making objection to that contract and opposing its being carried out by anybody? A. I do not.

Q. You remember the contract never was carried out, Mr. Curtis?

Mr. Cohen: Objected to as immaterial and irrelevant, and as re-

Objection sustained. Plaintiffs except.

Q. Where is that churn now, Mr. Curtis?

Mr. Cohen: Objected to as immaterial and irrelevant, and as relating to the contract Exhibit "C".

Objection sustained. Plaintiffs except.

Q. It is at your warehouse, is it not, in Fort Atkinson?

Same objection by Mr. Cohen. Objection sustained. Plaintiffs

except.

O. It was there the last time you saw it?

Same objection by Mr. Cohen. Objection sustained. Plaintiffs except.

Q. You don't know of its being removed from there do you?

Same objection by Mr. Cohen. Objection sustained. Plaintiffs except.

Q. There was a large amount of patterns made, were there not, of that churn?

Same objection by Mr. Cohen. Objection sustained. Plaintiffs except.

Mr. Reigard: Questions 346, 347, 348, and 349 relate to the same patterns and are offered in evidence by plaintiffs.

Mr. Cohen: We object to each and all of them.

The Court: The objection is sustained as to each and all of the

Plaintiffs except to the relings.

Q(546). There were some.

Q(347). What became of them?

Q(348). Were they in your warehouse the last time you saw them, or in your place of business there?

Q(349). You probably have them yet, if they haven't been de-

stroyed.

· Q. Were you not present yourself, Mr. Curtis, when the negotiations were had between Mr. Virtue and some of the others leading up to the execution of that contract.

Mr. Cohen: Objected to as immaterial and irrelevant.

Objection sustained. Plaintiffs except.

Q. What churn was the Cornish, Curtis & Green Manufacturing Company building last before making that contract with Mr. Virtue and Mr. Deeg?

Mr. Cohen: Objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. We made a combined churn at one time called the Wizard.

Q. Was that the last one you manufactured and made?

Same objection by Mr. Cohen. Objection overruled. Defendants except.

A. That is the last one we put on the market.

Q. Did you make some of that kind after the contract of Feb. 24, 1898?

Same objection by Mr. Cohen. Objection overruled. Defendants except.

A. I don't remember.

Q. If you did, it was under the direction of the Creamery Co., was it not?

Same objection by Mr. Cohen. Objection overruled. Defendants except.

A. I think so.

Q. Did you have any trouble with the patent on that churnany litigation—did anybody question your right to manufacture and sell that churn—the Wizard churn?

Same objection by Mr. Cohen. Objection overruled. Defend-

A. We never had any litigation.

Q. You never had any litigation over that churn or the patent?

Same objection by Mr. Cohen. Objection overruled. Defendants except.

A. No sir.

Q. 1 suppose the reason you discontinued manufacturing it was because of the contract of Feb. 24, 1808,—because the Creamery Picg. Co. wanted you to stop manufacturing it?

Same objection by Mr. Cohen. Objection overruled. Defendants except.

A. Well, it might have been an inferior churn, ioo.

Q. You wouldn't have anything to say about it. The Creamery Pag. Co. would have it to say.

A. I would have something to say by reason of my being a part

of the Creamery Pkg. Co.

Q. But not otherwise? A. No air.

Mr. Reigard: The plaintiffs and each of them now offer in evidence and read the deposition taken on their behalf under the stipulation heretofore referred to, of W. S. Goodhue. This deposition was then taken March 28, 1908, at Chicago, Ill.

## W. S. GOODHUE,

Sworn, testified as follows:

MR. LEACH: Q. Mr. Goodhue, where do you live?

A. Chicago, Illinois.

Q. How long have you lived here? A. 17 years.

Q. Prior to that time where did you live?

A. In the city of Stillwater, Minnesota

Q. Prior to March, 1898, were you connected with A. H. Bar-ber & Company?

A. I was secretary and treasurer of that corporation.

O. For how long prior to March, 1898?

A. A little over one year.

O. Was that concern a corporation?

A. It was incorporated in November, 1896, and commenced business in January, 1897.

Q. What was the nature of the business of that corporation in 1898,

prior to March?

A. It did a produce commission business, and butter, cheese and eggs, etc. And also a dairy supply business; and also refrigerating machine business.

Q. Have you any catalogue, Mr. Goodhue, showing the nature and extent of your business just prior to March, 1898? A. I have.

O. Will you please produce that catalogue?

(Catalogue produced by witness and marked Plaintiff's "Exhibit

Q. Does this catalogue, Exhibit A, contain and give a list of the articles kept in stock by the A. H. Barber & Co. just previous to March, 1898?

A. It does in the main, but I do not suppose it is quite complete in that respect.

Q. Throughout what territory were you doing business just previous to March, 1898? I mean the creamery supply business?

A. In the main it extended from Ohio to Kansas and Nebraska.

Q. North Dakota and South Dakota?

A. Some business, not very much there; the principal business was confined to the states nearer Chicago.

Q. Some business in the State of Minnesota? A. Yes sir.

Q. What was the capital stock of the A. H. Barber & Co. in February, 1898?

A. I could not give you at that time the exact amount, between \$100,000 and \$120,000.

Q. And your office and principal place of business was where?

A. At 229 South Water Street, Chicago, Illinois.

Q. Did you have traveling men on the road throughout the territory named?

A. We did, through a considerable part of the territory, not all.

Q. You also did a mail order business besides selling goods through traveling salesmen? A. We did.

Q. Can you give us an approximate estimate of the total amount of your sales in the creamery supply business made during the year 1897?

A. It would be an estimate, only an estimate; it probably exceeded \$200,000.

Q. Are you sure it was as high as \$180,000, Mr. Goodhue?

A. Really I cannot recollect.

Q. We would like to get the highest amount below which you are positive the sales of that year did not go.

A. I have no positive recollection.

Q. Your best estimate is \$200,000? A. Yes sir.

Q. On or about February 24th, 1898, did the A. H. Barber & Co. enter into a written contract with the Creamery Package Manufacturing Company (hereinafter called the Creamery Co. for short) and certain other corporations and persons?

Mr. Cohen: We object to that question, and move to strike out the answer because it is not responsive to the question and gives the contents of a written instrument. The question is whether A. H. Barber & Co., entered into a written contract or not, and the answer should be yes, or no, but the witness undertakes to give the contents of the contract. the Court of the granted the contested to be continue forces

A. Why, we entered into a contract with the Creamery Package famusectoring Company for the sale of that part of our business ertaining to the creamery or daily supplies and the ice or refrigerance machine; I don't recall whether there was any other parties or reporations that signed taid agreement or not

Q. Did you read over that agreement yourself, Mr. Goodbue? A. At the time it was made I did.

Q In your answer just given did you refer to the contract of February 24th, 1898, or one that was made afterwards?

A. I refered to the one that was made on or about Feb. 24th.

Mr. Cohen: I renew my motion and ask to have the answer stricken out, and also the answer to the former question.

The Court denies the motion

Defendants except.

O. Do you know now what parties, corporations and persons were mentioned in that contract as parties to it?

A. Well, I know that the Creamery Company and the A. H. Berber & Co. were mentioned and parties to the contract,

Q. Any others?

A. I don't feel sure as to that; it is a long time since I have seen the contract

Q. Name some of the concerns which were competitors of A. H. Barber & Co. in creamery supply business in the territory you have named as that competition existed previous to Pebruary 24th,

There were two houses at Cedar Rapids, Iowa; one was Cherry & Company and the other was some one a Harwood-L can't call the first name; P. B. Pargo & Co. at Lake Mills, Wis., Cornish, Curtis & Greene, Ft. Atkinson, Wis.; also a nouse at Milwaukee, Wis.; another at White Water, Wis.; F. B. Fargo & Co., a house at St. Paul, called the Pargo House; the Creamery Package Co., at Chicago, a branch at Mankato, Minn.; there was also I think a house at Sions Palls, S. D., orse at Toledo, Ohio; and I presume several others, I can't recall now.

A house at Waterloo, lowa?

A. Yes sir, Cushman, at Waterioo, Iowa. The house at Cedar Rapids was Mower & Harwood

Also Cornish, Cartis & Green Co. of St. Paul, state of Min-

O Also C. G. Hill & Co. of Kansas City, State of Missouri?

Also Cooks & Reed, of Des Moines, State of Iowal

A. I think so, I am not some whether they came in previous to that.

Q. How was it stated in the contract of February 24th, 1808, that the value of the property you sold, or stated in said contract you would sell, to the Creamery Co., determined or to be determined?

A. I don't remember.

O. How was it in fact determined?

A. Why, inventories were made up and submitted to the Creamery Co. I don't know just how it was determined.

Q. Who took those inventories?

A. Well, they were taken by A. H. Barber & Co. I think the Creamery Package Co. had a representative there; I am not quite sure.

O. Who was their representative there?

A. I do not remember.

Q. Who was the representative of A. H. Barber & Co.?

A. I don't remember that either.

Q. Have you that inventory here? A. I have not.

Q. Do you remember the total amount of that inventory in dollars?

A. I do not.

Q. Have you anything that you can refer to showing that amount?

A. I possibly could get it from the books; I don't think the inventory would be in existence.

Q. How was that purchase price paid by the Creamery Co.?

A. It was paid in stock of the Creamery Company.

Q. Paid in capital stock of the Creamery Company?

A. Yes sir, paid in capital stock.

Q. Can you give us the face value of that stock?

A. \$100.00 per share.

Q. And how many of those shares were received by the A. H. Barber & Co. in payment of that property?

A. 1006 shares.

Q. Was that about the value of the property sold by the A. H. Barber & Co. to the Creamery Co. at that time, \$100,000?

A. The property was valued at about \$75,000."

Q. The total property sold by A. H. Barber & Co. to the Creamery Company at that time on that deal was about \$75,000? Is that what you mean?

A. Yes, after deducting the liabilities that they assumed.

Q. Does that include the accounts? A. Yes.

Q. What was done with those 1006 shares of the capital stock of the Creamery Company? Was it distributed among the stock-bolder of the A. H. Barber & Co.?

A. It was held by A. H. Barber & Co. and sold from time until

it was disposed of.

Q. Do you remember the average price at which that sold per

A. 1 do not but it sold at \$75.00 up to close to par, and possibly some of it at par.

Q. What patents were included with the property sold by A. H.

Barber & Co. to the Creamery Co.?

A. I don't recall just what they were, all patents pertaining to that branch of the business which we had.

O. How many altogether? A. I don't recall that.

Q. Can you give us any of them?

A. Some patents pertaining to the ice machine, two or three, I think; there was one on the Babcock Tester, I think.

Q. Can you think of any others?

A. I think there was a patent or an application for a patent on a churn. I don't remember which.

Q. Any other patent you can think of?

A. I don't recall any others now.

O. On what churn, if any, was that?

A. It would be on a churn that we were manufacturing called the Barber Churn, Barber combined churn and Butter worker.

Q. Was that a churn that you had been selling in your trade before you made this sale to the Creamery Co.?

A. We had manufactured and sold it, not exclusively, however.

Q. Did you personally have much to do with the negotiations leading up to the contract of February 24th, 1898, between A. H. Barber & Co. and the Creamery Co.?

A. Yes, in connection with Mr. Barber.

Q. You mean Mr. A. H. Barber? A. Yes.

Q. He is now dead, is he? A. Yes sir.

Q. What position did he hold with A. H. Barber & Co.?

A. He was president of the Company.

Q. About how long a period of time did these negotiations continue prior to the making of that contract?

A. I could not say very definitely; probably a month or more.

Q. With what persons principally did you personally have those negotiations?

A. Mr. Gates of the Creamery Package Co. was the principal representative of that company. Mr. Walker, Mr. Sherwin and Mr. Rowe, all representing the Creamery Package Co. participated in the negotiations and perhaps some others.

Q. What other person of any other company?

A I don't know that I can remember them all; but Mr. Frank Fargo was present at some of the conferences and also Enoch Fargo.

Mr. Curtis and some others, Mr. Hill was there too, all that I remember definitely.

Q. Do you mean Mr. C. E. Hill, of Kansas City?

A. Of Kansas City, yes sir.

Q. And what Mr. Curtis? A. Mr. Curtis of Ft. Atkinson.

Q. H. H. Curtis? A. I think that is right.

Q. Where were those conferences held?

A. They were held some of them at the Briggs House and some of them at the attorney's office in Chicago.

Q. Any other places?

- A. I don't recall any other; there might possibly have been some in the office of the Creamery Package.
  - O. What attorney's office?

A. Well, I am not sure about that,

O. Were those attorneys in the employ of A. H. Barber & Co.?

A. Fry & Hyde represented A. H. Barber at that time: I think the conference was in some other attorney's office, I am not sure.

Q. After February 24th, 1808, was there another contract made between A. H. Barber & Co. and the Creamery Co.?

A. There was a contract made between A. H. Barber and W. S. Goodhue as individuals.

O. About what date? A. I think it was in May.

O. Have you that contract here? A. I have.

O. With this Exhibit executed at about the date it bears?

A. I think it was.

O. Were its terms and conditions carried out by the parties to the contract? A. They were.

Q. Was that contract extended?

A. I don't think it ever was in writing, but it was so far as the conduct of the business at that branch was concerned, until after the death of Mr. Barber, with the exception that my services for the Creamery company were discontinued at the termination of that contract.

Q. And how long was that business in the name of A. H. Bar-

ber & Co. in fact conducted after February 28th, 1898?

A. I can't say exactly but it was until the inventories were taken and the settlements made, probably about the date of this contract.

Q. This contract, Exhibit B? A. Yes sir.

Q. And then what became of A. H. Barber & Co.?

A. A. H. Barber & Co. continued business as produce commission merchants.

Q. Until how long? A. Until the present time, and still con-

tinue it

Q. About when was A. H. Barber Manufacturing Co. organ-

A. The business was commenced under that firm name about the time of this contract Exhibit B.

Q. What was the name of that concern, Mr. Goodhue?

A. A. H. Barber Manufacturing Co.

Q. Was that a partnership or a corporation?

A. It was the name under which the Creamery Package Manig. Co. conducted their business at 239 South Water street; it was not a corporation.

O. That is the business they purchased of A. H. Barber & Co.?

A. Yes air.

Q. And how long did the Creamery Co. so conduct that busi-

ness at that place?

A. Until a short time after Mr. Barber's death which occurred in July, 1903. They removed the merchandise and books and papers and everything that was left there, probably in September, 1903.

Q. After May 20th, 1808, the date of Exhibit B, was the business of the Creamery Package Co., advertised in the name of A. H. Barber & Co. or some other name?

A. Business at that branch was advertised in the name of A. H.

Barber Manufacturing Co.

Q. And was conducted by the Cres mery Co. in the way and manner stated in this Exhibit "B" until the September of 1903, after the death of Mr. Barber? A. It was, substantially.

Q. Were catalogues issued from your place on South Water

atreet after May, 1898? A. By whom do you mean?

Q. By A. H. Barber & Co. or A. H. Barber Manufacturing

A. There were not any issued after that date by A. H. Barber & Co., but I am quite sure one or more was issued under the name of A. H. Barber Manufacturing Co.

. Q. Who compiled and arranged for those catalogues?

A. I think they were, I think that at least one of them was compiled by Mr. J. Y. Sawyer and Mr. Graham. I don't know just what date.

Q. And those were issued from Chicago by whom? Mailed out by whom? A. A. H. Barber Manufacturing Co.

Q. From what place? A. 259 South Water street.

When orders were received for goods mentioned in that catalogue was it turned over to the Creamery Co.'s office? or were the goods shipped out from 229 South Water street?

A. The shipments were made from 229 South Water street or from orders from there; sometimes shipments were made direct from manufacturers.

Q. And what was done with the money received at 239 South

Water street for those goods?

A. It was deposited in the bank to the credit of A. H. Barber Manufacturing Co.

Q. Where was the office and place of business of the Creamery Co. during that period?

A. Well, during the-you mean their main office?

Q. Yes.

A. In the earlier part of the time it was on West Washington street, just across the river, I forget the number.

Q. How far from 229 South Water street?

A. About 6 blocks.

Q. And during the balance of that time where was their office?

A. They were located on the North Side.

Q. How far from 220 South Water street?

A. Well, two locations over there part of the time, about the same distance as before, or a little farther, after they moved to Kinzie street the distance was about 5 blocks.

Q. In the sale made by A. H. Barber & Co. to the Creamery Co., at what price, as near as you can tell were the patents figured?

A. I think the patents and good will of the business was figured about \$25,000.00

Q. After the money was received by A. H. Barber Manufacturing Company for the sale of goods from South Water street was placed in the Bank to the credit of A. H. Barber Manufacturing Company, what was done with it?

A. It was used for paying the expenses of the business and also for goods purchased.

Q. Used in that way by whom?

A. That branch, A. H. Barber Manufacturing Company.

Q. And checked out of the bank? A. Yes.

Q. By what person or persons checked out?

A. Mr. Barber and myself signed checks.

Q. What was done with that portion of the money so in the bank and not used in that way for expenses?

A. I don't know that I could tell you definitely about that.

Q. By whom was that checked out of the bank?

A. All the checks were signed, as I remember it, either by Mr. Barber or myself.

Q. Who received the profits of that business, so carried on in the name of A. H. Barber Manufacturing Co.?

A. The Creamery Package Manufacturing Co.

Q. Was this Exhibit "B" signed and executed by the persons named therein as parties to it at or about the date it bears?

A. It was.

Q. You spoke about Mr. Sawyer and Mr. Graham getting out a estalogue after May, 1808, for what concern were they working. Mr. Sawyer and Mr. Graham at that time?

A. A. H. Barber Manufacturing Co.

Q. What position did Mr. Sawyer hold in the Creamery Man-

nlacturing Company at that time?

A. He was at the head of the purchasing Company of that branch, the A. H. Barber Manufacturing Co.; he also had something to do with the sales and correspondence.

O. Did he have an office on South Water Street?

A. He had a desk in the office of the A. H. Barber Manufacturing Co. on South Water Street.

Q. Did he spend much of his time there each day?

A. Yes, about all of it.

Q. Did he also have an office over in the Creamery Company's place of business?

A. Not while he was with the A. H. Barber Manufacturing

'Co.; possibly he did later, I am not quite sure.

Q. After May, 1808, was the mail received by the A. H. Barber Manufacturing Co. and that received by A. H. Barber & Co. delivered at the same place by the mail carrier? A. It was.

Q. What churns did you sell before March, 1898?

A. We sold several different churus.

O. What names or makes?

A. Among the combined churns we sold the Barber and Disbrow and one made by Fargo & Co. and we sold plain churns.

Q. Of whom did you purchase the Disbrow churn.

A. I am not positive, but I think we purchased from the mannfacturers at Owatonna; it is possible that we might have some of the time purchased them from the Creamery Co.

Q. When did you first know or become acquainted with any of the reprecentatives of agents of the Owatonna manufacturing

Co.?

A. I could not give you the dates. I think it was soon after they commenced to make the combined churns.

Q. Were you able to buy churns of the Owatonna Manufac-Q. You did buy some combined churns and butter-workers

from the Owatonna Manfg. Co. previous to march, 1898?

A. I think we did.

Q. Do you not remember that A. H. Barber & Co. was unable after a certain date in 1897, to purchase any churns from the Owatonna Manufacturing Co.?

A. I think there was a time after which we could not, but I

don't know what the dates were.

Q. About what time was it that the Creamery Co. first proposed or entered into regotiations with A. H. Barber & Co. to purchase the cream apply business of A. H. Barber & Co.?

A. I could not give the exact date, but I think it was not very

far from the first of January, 1808.

- Q. Do you know where the contract of February 24th, 1898, was finally signed and the deal consummated?
  - A. As near as I could say in the City of Chicago.
  - Q. Are you a stockholder in the Creamery Co.?

A. Yes sir, I have one share.

- Q. Have you now been able to find that contract of Feb. 24th, 1808?
- A. I have made a diligent search for it, and I have not been able to find it.
  - Q. Have you any copy of it? A. I have not.

#### CROSS EXAMINATION.

(Read by MR. COHEN.)

Q. Do I understand that in this sale by the Barber Co. to the Creamery Co. the more or less tangible assets of the Barber Company were figured at \$75,000.00, and the good will at \$25,000.00?

A. That is the way I understand it; the tangible about \$75,-

000 and the good will about \$25,000.

- Q. Are you acquainted with Dennis E. Virtue, who has of late years been somewhat connected with the Creamery supplies interest in Minnesota? A. I am.
- Q. Is he the gentleman who has been sitting at Mr. Leach's side during this examination today? A. He is.
- MR. REIGARD: Counsel for plaintiffs now offer to read in evidence, on behalf of the plaintiffs and each of them the deposition dated May 13, 1908, taken at the same time and place as the previous deposition of Morris Murphy.

### MORRIS MURPHY,

tworn, testified as follows:

By MR LEACH:

Q. What is your full name? A. Morris Murphy.

Q. Where do you live, Mr. Murphy? A. Chicago, Ill.

Q. How long have you lived here? A. 14 years.

Q. What is your business or occupation? A. Superintendeut.

O. Of what?

- A. A. H. Barber Creamery Supply Co.
- Q. That is a corporation known as A. H. Barber & Co.?

A. A. H. Barber Creamery Supply Co.

Q. Were you ever in the employ of A. H. Barber & Co.?

Yes sir.

Q. Between what dates? A. 1894 and 1897.

Q. Until what time?

A. Until the name was changed to A. H. Barber Manufacturing Co. I could not tell just when that was.

Q. What was then done with the business of A. H. Barber

& Co.?

A. It didn't seem to be very much changed that I know of.

Q. Did you know of the Creamery Supply business and merchandise of A. H. Barber & Co. being sold to the Creamery Company?

A. I heard of a deal of that kind but saw no papers or contract.

Q. Did you in any way assist in carrying out that deal?

A. No sir.

Q. After you heard of the deal being made did you take any part in taking an inventory of the property of A. H. Barber & Co.?

A. I did.

Q. Can you tell when that inventory was taken?

A. I can't remember the dates.

Q. What time of the year?

A. If I remember rightly it was in early spring.

Q. Refreshing your recollection, was it in the spring of 1898?

A. It was in 1898, but I don't know just the dates.

Q. Who took that inventory?

A. There was a Mr. John Y. Sawyer, myself, and Mr. Patrick, and Mr. Walker and Mr. Landis, and some others of our boys, but I don't remember who just now.

O. In whose employ was John Y. Sawyer at that time?

A. A. H. Barber & Co.

- Q. You are sure of that Mr. Murphy? A. Why, I think so.
- Q. Did the Creamery Manufacturing Company, which we call here the Creamery Company for short, have a representative at the taking of that inventory? A. Yes sir,

Q. Who was that person? A. Mr. Patrick, Mr. Landis and

Mr. Walker that I can remember at the present time.

O. In taking that inventory at what price were the goods

figured with respect to their cost or selling price?

A. I could not say.

Q. What did you go by to determine the value of the property sold?

A. Well, that wasn't my part of the work; I had nothing to do with that part of it.

O. You simply made lists of the property? A. Yes sir.

O. Other persons determined the price? A. Yes.

Q. Did any other concern or corporation have a representative at the taking of that inventory?

A. I cannot remember that there was any other there, any rep-

resentative of any other concern.

Q. Previous to the time did A. H. Barber & Co. sell a churn and butter worker? A. Yes.

Q. What did you call that churn?

A. We called it the Barber combined churn and butterworker.

Q. Was that churn a patented churn?

A. I don't think so.

Q. Was the sale of that churn continued or discontinued shortly after, or any time after the taking of that inventory?

A. They were sold for sometime afterwards, but how long I

could not say.

O. How long as near as you can tell?

A. I should say about three years, as nearly as I can remember it.

Q. Was the sale of that churn then discontinued?

A. It was as far as I remember.

Q. Were very many of those churns sold during the time you were with A. H. Barber & Company, or A. H. Barber Manufacturing Co.?

A. There was quite a number of them sold, but how many I

could not say.

Q. Give us your best ides of the number sold?

A. I should say forty, as near as I can remember.

Q. Did that churn give good satisfaction on the market or in use?

A. It was not considered a practical churn.

Q. Are there any in use now?

A. Why, I should say there were.

Q. When you say it was not considered a practical churn, by whom do you mean it was not considered practical?

A. By creamerymen.

Compset for plaintiffs now offers to read in evidence on behalf of the plaintiffs and each of them the deposition dated May 14, 1908.

taken at the same place as the previous deposition, of Frederick J. MacNish, under the same stipulation heretofore referred to.

# F. J. MACNISH,

sworn, testified as follows:

# By MR. LEACH:

What is your full name? A. F. J. MacNish.

You live in Chicago and how long have you lived here?

A. I live in Oak Park, Illinois, and I have lived there since 1000.

- Q. Is that a part of Chicago? A. No sir.
- O. How far from Chicago? A. 9 miles.
- Q. Bebore living there where did you live?

A. Kansas City, Mo.

Q. How long did you live in Kansas City? A. 15 years.

Q. What was your business in Kansas City?

The last 7 years of my residence in Kansas City I was in the brokerage and commission business, selling packages, also a side line of creamery and dairy goods.

Q. What is your present business, Mr. MacNish?

A. I am the Asst. Secretary of the Creamery Package Manufacturing Company of Chicago.

Q. Do you hold any other office in that corporation?

A. I do not.

Q. Are you a director in that corporation? A. I am not.

Q. How long have you been assistant secretary?

A. Three years.

Q. Before that time did you hold any position in the Creamery Package Manufacturing Company, which we here call the Creamery Company for short?

A. Before that time I was sales manager of the Chicago

branch of the Creamery Co.

Q. Were you ever a director in that corporation?

A. I have never been a director.

Q. Have you held any other official position in that corporation aside from Asst. Secretary? A. No.

Q. Is that an office provided by the by-laws of the Creamery

Co.? A. It is not.

Q. Who determined who shall fill that office and by whom were you made Asst. Secretary?

A. The directors of the Company.

Q. What are the duties of that office of Asst. Secretary?

A. To act as secretary in the absence of the regular secretary.

Q. Who is the regular secretary and how long has he been?

A. H. J. Ferris.

Q. And how long has be been? A. One year,

Q. Who before him? A. George Walker.

Q. How long was he Secretary?

A. As I remember something like four or five years."

Q. How much of the time does M. Ferris, and has he during

Q. And who before him? A. I do not recall. the last year, devoted to the duties of that office?

A. Mr. Ferris has attended to all the duties except one meeting of the directors during the past year.

Q. Who is the treasurer of the Creamery. Company?

A. D. E. Wood.

Q. How long has he been? A. Several years.

Q. Who before him?

A. If I remember correctly it was D. H. Roe.

Q. Who is president of the Creamery Company?

A. Charles H. Higgs.

Q. How long has he been president?

A. About three years if my memory serves me correctly.

Q. Who was president before him?

A. Charles M. Gates.

Q. Is Mr. Higgs also the General Manager of the Company.

A. Yes.

Q. - Who receives the mail of that company and answers the correspondence?

A. The mail is received by a clerk and distributed to the various departments, who take care of it in the regular order of business.

Q. What does Mr. Higgs have to do with that mail and correspondence? A. Nothing at the present time.

Q. How long since?

A. Mr. Higgs has had very little mail of any kind, except personal correspondence for the last 6 or 8 months, only very important matters being referred to him, and then very seldom in the nature of correspondence.

Q. Does he go to the office every day, or nearly every day?

A. For the past few weeks since his return from the East he has averaged perhaps three days a week, one hour at the office, before that back as far as last August, he has been away most of the time, on account of his health.

Q. Was he at the office yesterday?

Did you see Mr. Higgs yesterday? A. I did not. Have you seen him this work?

I have seen him at the office twice this week.

Did you talk with him? A. Once only.

Has there been a meeting of the Board of Directors of the Creamery Company this week? A. I think not

Last week?

A. If I remember correctly the regular meeting occurred last

Q. Was Mr. Higgs present at that meeting?

A. He may have been

Q. Do you know? A. I do not.

What has been the actual work you have done and performed for the Creamery Company since Feb. 24th, 1898? Give everything in detail up to the present time?

A. I was first credit manager of the Chicago branch of the Creamery Company, next sales manager, and after that, I have been engaged in the general work of the Company, among the branches and factories, particularly, the factory end.

Q. Have you during the past year or two visited the branch

offices and places of business of the Creamery Company?

A. I visited some of them not all.

Q. Which ones have you visited and when?

A. I am afraid I can't answer that, sa it would entail a memory that is longer than mine. I might add that I am on the road among the factories at least one-third of my time.

Q. Have you visited the place of business of the Creamery Co.

at St. Paul, Minn, lately, and when was the last time?

A. I was in the office in St. Paul on March 10th for about an hour.

O. This year?

A. This year, at the time of the National Dairymen's convention held in that City.

Q. Under what name does the Creamery Company conduct at St. Paul their place of business just mentioned?

A. Fargo Creamery Supply House, St. Paul, Minnesota.

Q. At what place in St. Paul?

A. I do not know the number and the street.

Q. Do you know the name of the street?

A. Not the name or number of the street.

Q. How long has the Creamery Company been conducting to place of business under the name of Fargo Creamery Supply

- A. If I remember it correctly since 1900, I would not be absolutely sure.
- Q. Previous to that time what name was used by the Creamery Company under which it conducted business at St. Paul?

  A. F. B. Fargo & Company.

  Q. From about what time? A. The fore part of 1898.

  Q. You have been asked to produce a certain contract by the

subpoens served upon you. Have you that contract here?

A. Yes,

Q. May I see it? (Witness hands Mr. Leach the contract)

(Contract marked for Identification "Exhibit E.")

O. Is Exhibit "E" an original of that contract?

A It is

MR COHEN: As to Exhibit E, it may be stipulated that Exhibit E, is the same as Exhibit A in the complaint, and that Exhibit E is the identical original contract from which counsel for plaintiffs read today being the contract of February 24, 1898.

Q. You signed that contract at about the date it bears?.

A. About that date; yea-

Q. Since the date of that contract, have the terms, stipulations, agreements and provisions, stated and set forth in that contract; Exhibit "E", been carried out and performed by the persons and torporations named therein as parties to it?

A. To the best of my knowledge they have.

Q. I see there is one section, or perhaps more, which is crossed out by ink marks. Was that done before, at the time of, or subsegnent to its execution? A. It was done before Execution.

Q. That contract, was it executed by all the parties named as parties to it, either by signing this contract here produced or a copy of same? A. Yes.

Q. Did you hear the testimony yesterday of Mr. Goodhue when he told us on the witness stand how the business of the Creamery Company was conducted on South Water Street in the same of A. H. Barber Manufacturing Company?

A. I heard a portion of it.

Q. Why was that business so conducted at that place under name of A. H. Barber Manufacturing Company instead of un-A I was not an officer of the Company; I do not know.

Q. Who is the general manger of the Creamery Company in Paul at its place of business, known as the Fargo Creamery pply House?

Stop and the vibral to reach the first and a particular to the

countrie general office of the Commenty Co. in Chicago.

low long has that been-true?

White the year sty it that three Countries, Supply Rives at

A. A branch of the Creamery Company of Chicago, as you will find in Dunife 2. G. Dunn's or Bradetreet's reports.

In it a conartnership of corporation?

It is a branch of the Greathery Package Manufacturing Company of Chicago, which her corporation under the laws of II.

A that the best mayer you can give to har question -

It seems to me that I have answered it; that it is a comporation, or a tranch of a corporation organized under the law of the State

O . Do you mean have the someonion ander the contact.

Ame of the Pargo Creamery Supply House?

24. 1 do not understand that the Pargo Creamery

House is a corporate fami

O. You meen, do you not that the Pargo Creamery Supply liouse is simply a name under which the Creamery Company has been transacting inclinese during the period you have named, and

O. And before they used the last mentioned name at St. Paul they used the name of F. B. Fargo & Co.?

O. I think they did although I was not an officer at that time.

O. What other branches or places of business of the Greamery Company outside of Chicago have you visited recently in Minne-

O How king has the Creamery Company, and a breach office and place of purchase in Minnespotis?

Landing Hotel

During all that time has the office and olace of busines son coldinated and atterplace under the start of the Grand Package Manufactoring Company

treatment has although a could not say as to the conof their business back of 1808.

Of When his year has windt the office and place of business of
Cressier, Company a. Lake Mills, Wisconsin?

About three weeks are

On United what make does stace at Late Wills?

A. Fargo Chestaery Supply House, Lake Mills

Q. How long has the Fargo Creamery Supply House been transacting and conducting its business, or asing that name at that place?

A. If I remember correctly of transport that place by the Creamery Company?

A. F. B. Fargo & Co., Lake Mills, or Q. Was either the F. B. Fargo & Company, of Lake Mills, or

the Creamery Supply House of Lake Mills, a corporation distinct and separate from the Greamery Company since the terms of Exhibit "B" were first agreed to or carried out?

A. I think not but my knowledge is not certain on that point.

Q. Those were simply names, were they not, under which the freamery Company has been and still does transact its business from Lake Mills, Wis.?

A. The name of the Creamery Company's branch at Lake fills is the Harry Greenets, Supply House . the majority of the business, attrough no all, is conducted under the name

O By whom? A Py the Steamery Company.

When did you last visit the branch of the Creamer, Com-By at Pt. Atkinson, State of Wisconsin?

A. About three weeks ago.

Under what name for the Creamery Company conduct the miness at that place?

A. Cornish, Curtis & Green Haoutscraving Company. Q. How long but it been so doing?

A My own knowledge extends to 1902.

And from that time to the present time?

Yes six

Has the Creamery Co. a place of business in Kansas City te of Missouri? A Yes

Under what name does the Creamers Co conduct its bun-at that place?

Creamery Package Manufacturing Company.

And how long has it been using that same at that place?

Could not give the exact date, but it it at least to year

Die the Creamery Co. lave a place of Business there exis to Feb. 24th 18:87 A. Yes.

Were you ever in business in Ranges City yourself, as a er of the firm of C. E. Hill & Co.). A.

6. Wall that concern a composition of partnership?

L. Carmentip

Any prince mimber of that benness the two just named

of what was the capital that partnership had invested

mething like \$35,000.00. I would not be sure of the ex-

What was the nature and description of that property?

The property consisted of merchandise in store, accounts it, horses and wagon, office furniture and fixtures.

Was a portion of that property creamery and dairy sup-

A. Yes

Did you sell a combined churn and butterworker?

I do not remember of selling a combined churn and butteror, although we might have done so.

Did you try to? A. I do not remember.

Q. What became of the place of business of C. E. Hill & Co.

A The partnership was dissolved, and the business was short-by afterwards taken over entirely to the Creamery Package Manu-O. Give on the date, as near as you can, when that change was

A. Sometime in the latter part of 1898; I would not be sure

of the exact date.

Q. When did you last visit the place of business of the Creamery Company at St. Paul, State of Minnesota, there known and conducted under the name of Cornish, Curus & Green Company of St. Paul.

A. I never visited it; know, nothing of it beyond hearsay,

Q. This contract of Feb. 24th, 1898, Exhibit "E" states that you perroughly should so and perform certain things; did you do those things? A. I did.

Q. After the execution of Exhibit "E" how was the property

of C. E. Hill & Co., transferred to the Creamery Co.?

A. If my memory serves me correctly we made a bill of sale to the Creamery Company.

That property was all personal property and no real pro-

. The property of C E Hill & Co., was entirely personal towerty, there being no real estate or no buildings, no patents, size of merchandus, excounts which we guaranteed to make good if make before furniture and wagous, etc.

On the whole manner was that property paid for to yourself and

te. 7111 by the Cremsery Company?

A. By stock in the Creamery Co.

Q. How many shares of capital stock?

A. I do not recall the exact number, but it was at the rate of \$100 per abuse for every \$100 of our assets.

Q. After that capital stock was received by yourself and C.

E. Hill, what was done with it?

A. It was divided between Mr. Hill and myself according to our respective interests in the copartnership.

Q. About what percent of the whole did you yourself receive?

A. Something a little over a half.

Q. And can you tell us how many shares you received?

A. I cannot at this time, without referring to my record.

Q. How was the property transferred by C. E. Hill and Company, the value of it determined?

A. According to the contract with the Creamery Company which we had made with them about Feb. 24th, 1808.

Q. What individual determined the value of that property?

A. S. S. Swasey, G. F. Belknap and myself.

Q. Which one of those was acting for the Creamery Company?

A. The second, G. F. Belknap.

Q. What concern was Mr. Swasey representing?

A. Cornish, Curtis & Green Co., of Ft. Atkinson, Wis.

Q. The last named was then a corporation?

A. Yes. I would like to add there that these parties were named as a committee acting for all parties to the contract of Feb. 24th, 1898; when I stated that S. S. Swasey represented Cornish, Curtis & Green, I meant that he was working at the time for that Company; but in valuing C. E. Hill & Company's property he was acting under the contract.

Q. What persons or committee named and selected those persons to take that inventory?

A. The persons named in Clause and of the contract of February 24th, 1898.

Q. Did those same persons take an inventory of all the property of all the other corporations and persons of whom purchases were made as described in Exhibit "E"? A. Yes.

Q. And was capital stock of the Creamery Company issued to those different corporations and persons in payment of that property?

A. It was; subject to the stipulations contained in other clauses of the contract of February 24th.

Q. And the property of those corporations and persons transferred by deed, bill of sale, or assignment, according to the nature of the property, inventoried? A. Yes.

O. What of those corporations or persons owned and so transferred any patents?

A. A. H. Barber & Co., Creamery Package Manufacturing Co., F. B. Fargo & Co., Cornish, Curtis & Green Manufacturing Co.

Q. Do you know or can you find out at noon and tell us this afternoon, approximately, how many shares of capital stock were transferred to those corporations in payment of the patents respectively transferred by them to the Creamery Company? And how much for the balance of the property transferred?

A. I will see what I can find out.

Q. Will you look at Paragraph 19 of Exhibit "E", and tell us if that was the way those patents were paid for?

A. To the best of my knowledge no bonds were ever issued.

Q. You think they were paid for in capital stock?

A. Yes.

Q. Has the Creamery Co., a place of business at Waterloo, State of Iowa? A. Yes.

Q. When did they acquire a place of business and commence

conducting business there?

A. I am not quite certain of the exact date, but about 1900.

Q. What place of business, if any, there, did they purchase?

A. Cushman & Co.

Q. After that purchase did the Creamery Co., conduct that same business at Waterloo, and for how long? The same business?

A. I do not know whether the business was conducted afterwards for any time in the name of Cushman & Co. or not.

Q. Does the Creamery Co., conduct business there row?

A. Yes.

O. Under what name?

A. The Creamery Package Manufacturing Co.

Q. How long have they been using that name at that place?

A. I could not say exactly, my knowledge extends back on that point about 5 years.

Q. Did Cushman & Co. at the time they sold out to the Creamery Co., and for sometime just previous sell as a part of their business, creamery and dairy supplies? A. Yes.

Q. What price was paid to Cushman & Co., for their property?

A. I do not know; I had nothing to do with the negotiations.

Q. Was there any real property in the deal?

A. I know nothing of the negotiations.

Q. Does the Creamery Co., own real. property there now where it transacts its business?

A. If by real property you mean real estate, no; if goods and

merchandise, yes.

Q. Does the Creamery Co., own and conduct a place of business at Des Moines, Iows? A. Yes.

Q. Under what name?

A. The Creamery Package Manufacturing Co.

Q. What concern did the Creamery Co., buy out at that place

A. A small firm named Cook & Reid.

Q. And after that purchase did the Creamery Co., for a time use the name Cook & Reid? A. I do not know.

Q. Has the Creamery Co., a place of business in San Fran-

eisco, California? A. No.

Q. Do you know De Laval Dairy Supply Company, of San Prancisco?

A. DeLaval Dairy Supply Company of San Francisco are the agents of the Creamery Package Manufacturing Company for the sale of its dairy specialties on the Pacific Coast.

Q. Is the De Laval Dairy Supply Company, of San Francisco,

a corporation?

A. I could not answer that; I do not know.

Q. Has the Creamery Co., a place of business at Rock Island, State of Illinois?

A. I would not be sure, but I think there is a butter tub fact-

Q. Is that known as the Fremont Butter Tub Company?

A. I think it is.

Q. And that is a corporation?

A. I don't know as to that.

Q. Do you know about when the Creamery Co., purchased that business. A. No.

Q. Under what name is that business now conducted at Rock Island?

A. As I said before I think the Fremont Butter Tub Co.

Q. When that property was so purchased by the Creamery Co. was it taken in the name of Mr. McBroom as Trustee for the Creamery Co.?

A. I do not remember, if I ever knew.

Q. Has the Creamery Co. a place of business at Rutland, Vt.?

A. Yes.

Q. Under what name there? A. Creamery Package Manusacturing Co.

Q. How long has the Creamery Co. been so conducting a nainess at that place?

A. About a year and a half.

). What concern did they purchase?

A. The Stodar't Manufacturing Co.

O. Did the Greatery Co: purchase the business the prop-the Stargus, Cornich & Burn concern deleg benignes in Chic Peul and Ranson City?

They perchased part of that business.

About when? A: Four or fees years ago.

And has the Creamery Co. been conducting that business A. No.

Do you now know what price was paid for the patents transferred to the Creamery Co. that you mentioned this forenoon, saide from the patents transferred by A. H. Barber & Company?

A. I could not find any record of this kind. There was no division made in this way. I would like to state, however, that in se A. H. Barber & Co. case they were allowed something like Secure of the other parties for extra value of their patents.

MR LEACH. We offer in evidence Exhibit "E", the same being the contract of February 24th, 1808.

Q. la Mr. C. E. Hill now living, Mr. MacNish? A. Yes.

O. Where is Mr. Hill?

A. The last I heard of him he was in Almeda, Cal.

Q. Is that his place of residence? A. I understand it is.

Q. Is he now connected in any way with the Creamery Company? A. No.

O) Where is Mr. H. L. Bellensp, and where does he live?

A. He lives at present somewhere in Pennsylvania; the exact

Q. Where is S. S. Sweeey? A. In Dekalb, Ill. O. And where is Mr. Hill?

A. The last I heard of him he was in Almeda, Ca).

2. Did you personally have very much to do with the negotiations leading up to the making of Exhibit "E"?

A. With Mr. Hill, my partner, I conducted negotiations look ing toward the sale of our business to the Creamery Co.

Q. For how long a time before Feb. 24th, 1898?

L. Perhaps to days.

Q. With whom was that correspondence on your part mostly

A. With the Creamery Co.

When did you first learn of a contract which was made in 1807 between the Owatonia Manufacturing Co., and the Crease ary Co., either Exhibit "A" or Exhibit "B" attached to the Answer se this case of the Creamery Company? Is other words, when the paterns Mauniacusing Co. and the Creamery Co.

MACH These schibles A six B correspond probable

with some exhibits attached to the complaint, but I cannot locate them at the present time.

MR. COHEN: There are two contracts made believe February 24, 1898, between the Creamery Package Manufacturing Company and the Owatonna Company, and we will identify them later without delaying the court at this time.

A. I learned through others at the time of the negotiations, about Feb. 24th, 1898, that such contract as Exhibit "A" and "B" existed. I never saw them or knew the contents of these con-

tracts until several years after.

Q. Where were you when you signed Exhibit "E"?

A. In Chicago.

Q. On what date? A. I do not recall the exact date.

O. What month?

A. The contract speaks for itself; it must have been somewhere near that time; although I wouldn't say exactly.

Q. Were representatives of the other parties named in Exhib-

it "E" present at that time? A. Yes.

Q. Was that a sort of a general meeting of those representatives? A. It was.

Q. Who was present at that meeting from the Owatonna Manufacturing Co.?

A. At the time the contract was signed the representatives of the Owatonna Manufacturing Company, were to the best of my knowledge not present; I am referring to contract Feb. 24th, 1898.

Q. Had you seen any of those representatives of the Owatonna Manufacturing Co. at that time, and just before? A. No.

Q. Did any of them know anything about this proposed contract Exhibit "E" so far as you know, or do you know anything about it?

A. I know nothing about it.

Q. When did you first see or become acquainted with any

representative of the Owatonna Manufacturing Co.?

A. I became acquainted with members of the Owatonna Manfacturing Company sometime in 1900, at the time I became Sales Manager of the Chicago Creamery Co.

Q. When you signed Exhibit "E" did you know that certain stigation was pending in the U. S. Court involving certain patents between F. B. Farge & Co., and the Owatonna Manufacturing Co.?

A. I had heard of it; it was a matter of common knowledge the trade.

Q. Afterwards did you know of a stipulation being executed elween the principals involved in that litigation, providing as to by the case should be determined?

A. I learned of it afterwards.

Q. Can you give us the date you learned of it?

Probably in the year 1902 or 1903.
After that stipulation was made was that case brought to inal and tried in the United States Court?

A. My knowledge does not extend that far.

Was the case, in fact, tried in the U.S. Court and a declason rendered in the ordinary way? A. I do not know.

Do you know of a decision being rendered in that case?

A. I do not

Q. What is the name of that case?

A. I do not know the exact name.

Q. What is the present capital stock of the Creamery Package Manusacturing Company?

MR. COHEN: That is objected to as immaterial and irrelev ant.

Objection overruled. Defendants except.

A. \$4,000,000.00.

Q. When was the last increase made?

A. In January, of this year, I think.

O. How much was that increase?

MR. COHEN: Objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. One and one half millions.

Q. Before January how long had the capital stock been two and a half millions?

A. I cannot give you the exact date.

Q. What dividends has the Creamery Co. been paying on its capital stock during the last several years?

A. Right per cent on the stock issued.

Q. Did you know of the purchase by the Creamery Co. of the business and property of E. W. Ward & Co. of St. Paul, State of Minnesota?

A. I heard of it in a general way; I had nothing, whatever to

do with it, however.

Q. When did you first hear of it?

A. About a year and a half ago; perhaps a little longer.

After that purchase did the Creamery Co. conduct and continue the same business under the name of E. W. Ward & Co.?

A. A think not.

O Did the Creamery Co. close up that business after they

to the sector my more look her himbly bought the stock

at the instance of Ward's relatives, and the stock was absorbed into the stock of the Creamery Co., in Minneapolis. Ward was alterwards sent to an insane asylum. The stock referred to mean.) Ward's stock of n erchandise, and not capital stock.

#### CROSS EXAMINATION.

### Read by MR. COHEN:

In saying that the capital stock of the Creamery Co. has recently been increased to \$4,000,000, do you mean that that amount of stock has been authorized or actually issued?

A. Authorized only. \$3,000,000.00 is of issue, and no part of the \$1,000,000 remaining can be issued without the authority of all the stockholders.

Q. In your direct examination you have mentioned various branches of the Creamery Co., situated at various places in the United States. I wish you would describe briefly the nature of the business carried on by the Creamery Co. at these different places respectively?

A. Starting in the East our Rutland Factory makes creamery goods, silos, and goods directly connected with the dairy business. Ft. Atkinson and Lake Mills manufacture creamery, cheesefactory, lee cream and dairy goods. These three houses manufacture practically all of the apparatus used by the Company. DeKalb, Ill., manufactures only ice machinery. Portland, Ind., Elgin, Ill., Kansas City, Kas., Rock Island, Ill., Mankato, Minn., Butter Nut, Wis., and Bay City, Mich., manufacture butter tubs or parts of butter tubs. Selling houses who dispose of the output of these factories comprise Minneapolis, Minn., St. Paul, Minn., Des Moines and Waterloo, Iowa, Omaha, Neb., Kansas City, Mo., Chicago, Ill., and Rutland, Vt.

### RE-DIRECT EXAMINATION.

# Read by MR REIGARD:

Q. The only selling house that you have mentioned in St. Paul, and the only one there owned or conducted by the Creamery Co. is the one you mentioned in your direct testimony, operated under the name of Fargo Creamery Supply Co.? A. Yes.

Q. What is about the actual selling value at present of capital sock of the Creamery Co.?

A. Some where around par.

Q. The Creamery Co. sells a large quantity of goods, do they on the Pacific Coast? A. Yes, quite a few.

Q. From what place there, and through what house?

A. The DeLaval Dairy Supply Co., San Francisco.

Q. Does the Creamery Co. own any capital stock of that company in California? A. I do not know.

C. E. Print, a witness incredited and swors on the part of the phrintiffs, testifies as follows:

Promination-service by Mr. 1 20-1.

O. Mr. Frink, you live in St. Paul? A. I do.

Q. How long have you lived there? A. Since January 1, 1893.
Q. What were you doing in the years 1897 and 1898; the first art of 1898?

A. I was general manager for the branch house of F. B. Fargo 13(6)

O. Where located A. In St. Paul.

Q. How long had you held that position prior to February 24th, 1898? A. Since January 1, 1893.

Q. For nearly five years? A. Yes, sir.
Q. What were your duties while such manager there for the F. B.

Pargo house in St. Paul, what position did you hold?

A. I held the position of general manager. I done all the purchasing, in fact I done all the business except selling on the road. They had several selemen on the road. The office business was carried on by myself.

Q. Did you have charge of the salesmen? A. I did.

Q. Were you for a time a salesman on the road, a salesman for that house? A. I was prior to January 1st, 1893.

O For about how many years it

A. I think some five or aix or seven years.

O. After February 24th, 1808 what were you doing?

A I was transferred from the St. Paul house to Chicago.

O. About when did that transfer take place?

A September first 1898, I think it was.

O. What house in Chicago were you then transferred to?

The A. H. Barber Manufacturing Company.

Q. What position did you occupy with the A. H. Barber Manufacturing Company?

A. I was manager of the sales department of the refrigerator

Q. How long did you remain there? A. Two years.

O. Was that a port of the A. H. Barbes concern which was owned and controlled by the Creamery Package Manufacturinging Coment? A. It was.

What we the frames of 12 5 tags ( Comment in St.

Pant during all actions for the party from the party from party from the first

A. The house was established for the sales of the goods that were

manufactured at Lake Mills, Wiscomin.

O. Give a description of those goods?

A. The goods which they manufactured were practically every-thing used in a creamery, in the line of dairy goods; such goods as boilers and engines, we manufactured some; but the larger portion we bought on the open market; but the churns and butter worker and cream vata and all the specialties were manufactured by them, an sold by ue in St. Paul.

They were manufactured by F. B. Pargo & Co. at Lake Mills?

Yes sir.

And sold by P. B. Pargo & Co., at St. Pani. A. Vez, at

Your general store was in St. Paul?

It could be called that. There was a full line, we carried a full line of all kinds of supplies

Q. Did you do any manufacturing there? A. No. air.
Q. Did you have a combined churn and butter worker?

Yes, sir.

O. What was the name of that! A There were several names.

O For the same churt of different churts?

Well, the same churn made at different places, different modbut doing the same business in the creamery.

O. Did that include the Victor churn? A. Yes, sir.

O. Through what territory did you sell these creamery supplies and these churns during the time you were in St. Paul?

A. Our territory was supposed to be wherever we had a mind to go, but we generally confined curselves to Minnesots and northwest Wiscomes and both of the Dakotas. Very little in Iowa, sometimes Wisconsis and both of the pasters we would go outside the line, but very little.

Q. About how many traveling men did you have on the coad?

A. I think the first year we had only two, but it increased in 1897 to 17 I think, the pay roll in different capacities, I think.

Q February 24, 1898, how many did you have at that time? At I think there was about that number at that time.

Mr. Cohen. Do you mean men on the pay roll, or traveling men? Witness. They were on the pay roll in different capacities, some were machinists and not salesmen.

O. How many of these were traveling men?

A. I think there was about five or six who were really creamery salesmen; some were contractors and some were machinists.

Q. How large a stock of goods did you have on hand right along the first of 1906, before the 24th of February?

A. Our stock would, if I remember rightly, invoice about \$30,000, netimes it was lower and sometimes it was higher

Q. Did you carry a full line of all creamery supplies?

We did.

And also these churns and butter workers? A. Yes, sir.

Q. You used the word specialty in one of your answers, what do you mean by specialties?

A. I mean the articles that were made under patents that were controlled by the F. B. Fargo Co.

What were those?

A. There were combined churns and butter workers, milk testers; milk weighers, milk and cream vats, and quite a large number of similas articles that I can't call to mind.

Q. Do you mean all the things that were controlled by the F. B. Fargo Company up to that time?

A. All kinds that were controlled or were made by him.

Q. Which he was making at that time?

A. I couldn't say that he was making anything except under the Victor patents; he might have been, but to my knowledge that was the only kind.

Q. It was a combined churn and butter worker? A. Yes, sir.

Was that the Victor churn, and the two roll or four roll?
At the time we were using it I think it was the four roll machine

Did you make a two soll machine before that?

I am quite positive that we did.

It was what was then known as the style A machine?

Yes, sir.

Q. And the style B machine too?

A. The style B machine I think had only one soller.

While you were traveling for F. B. Fargo & Co., over what territory did you sell?

My home was in Iowa; I done the greater part of my traveling in lows, although I went into Kansas, Nebraska, South Dakota, Wis-

Q. Prior to February 24, 1898, did you have any competitors in e of business you have just mentioned with P. B. Fargo & Co., of St. Paul?

A. The Creamery Package Manufacturing Company, the last few ears in Minneapolis, and the Cornish, Curtis & Greene Company.

O Did your competition extend throughout all the territory in which the Pargo Company did business? A. Yes, sir.

O. These concerns that you have named, were they the only com-petitors or the chief competitors in that territory, were they the chief

competitors of were there several others?

A. A. H. Barber & Co., of Chicago, D. H. Rowe of Chicago, Mower & Harwood of Cadar Rapids, Iows, J. G. Cherry & Co., of Cedar Rapids, Iowa, A. J. Cushman & Co., Waterloo, Iowa, Payne & Campbell, Dubuque, Iowa; then there were about eight or ten small local houses which we would consider as small jobbers, that didn't interfere very much with our line of trade, except in their own local territory.

Q. How about Heil? A. I don't think I met him there.

Q. All these you have named, did they all do business in Minnesota? A. At times.

Q. D. H. Rowe, was located where? A. Chicago.

Q. Did be manufacture to a certain extent?

A. I think he did manufacture some.

Q. Was it a very large house?

A I wouldn't say it was a very large house.

Q. Was Mr. Rowe connected with the Creamery Package Manufacturing Company? A. Yes, sir.

Q. In what capacity?

A. He was a director in that company, I think he was also treasurer, I think at one time.

Mr. Coben. Unless you don't know, say so.

Q. Do you know he was an officer?

A. I don't know what his position was.

Q. But you know he was an officer?

A. Yes, sir, I think he was.

Q. Do you know about what time he became an officer of the Creamery Package Manufacturing Company, or about what time he became affiliated with the Creamery Package Manufacturing Company? A. About the same time we did.

Q. February 24th, 1898? A. Yes, sir.

Q. This A J. Cushman Company that you have mentioned, where were they located? A. Waterloo, lows.

Q. Did you know Mr. Cushman personally? A. Yes, sir.

Q. What was his name?

A. The old gentleman was J. A. Cushman, I think that was his initials, but the business was carried on by his son.

Q. A. J. was it not? A. I think that was the initials.

Q. Was it a large concern?

Mr. Cohen. I object to that as indefinite, whether it was a large or small concern it is too indefinite.

Q. What was the nature of the business of A. J. Cushman & Co., of Waterloo, Iowa?

A. Manufacturers of butter tubs, and the sale of all kinds of cream-

- With a season with the season season.
- Whenever they could get business. Was it a large or small business?
- and the contract of the contra

Mr. Cohen. That is the same question that was ruled out. I think we ought to have the answer stricker e at.

The Court. It may be stricken out, though I think on cross exami-tion you could find out what it was.

- Q. Where was the J. G. Cherry Company located?
- Cedar Rapids, Iowa.
- What was their business?
- Manufacturers of milk cans, creamery hauling cans, and egg and the general handling of dairy supplies.
  - Mower & Harwood, where were they located? Cedar Rapids.
- What was the nature of the competition between your concern and these different concerns, just prior to the 24th of February, 1808. vas there a strong competition?
  - A. There was a very strong competition, yes, sir.
- That resulted in cutting prices sometimes, or how did it affect
- A. The prices what we considered very low. We were not getting the prices that we had got a few years prior to that time, and the dis-O. How soon did you know, if at all, of this contract of February
- 18981 A. The day it was signed.
  - Did you see the contract that day! A. No, sir.
  - Had you seen it before that time? A. No, air. Did you see it after that time? A. Yes, air.
- Where did you see it?
  I think I saw it in Chicago, at the office of the Creamery Packe Manufacturing Company.

  O Were you asked to sign a contract? A. Yes, sir.

  - Mr. Cohen. 'That contract, or a contract?' Q. Were you asked to sign that contract of February 24,, 1898?
- No, sir, not that contract.

  Did you read it over? A. Yes, sir.

  Did you attend any of the meetings, any of the meetings of the contract of these different concerns, prior to the making of the con-
  - I mean negotiation scaling go to the making of the contract!

Q. Where were they wouldy held?

A. The majority of them at Chicago in the office of the Creamery Package Magnifacturing Company, or in the parlors of the Brig House.

About how one it to the time were there meeting being lightly

fore the making of the contract?

A. I should say the first one was some five mouth price to the igning of that contract.

How frequently were they held up to the time the contract was inally made? A. Quite often.

C Did you attend them all? A No, sir.

Q. Who usually did attend those meetings while you were there?

A. In most all cases the managers of all of the branches, or all if the houses that were intending to go into the combination, and iso a large number of the stockholders of the different concerns.

Q. That is, of these concerns which did in fact go into the conract? A. Yes, sir.

O. Did anyone else besides these persons attend these meetings?

A. There might have been.

Q. Do you know the D. H. Burrell Company of New York state?

A. I knew them quite well.

Q. Did that company have a representative at any of these meetgs? A. They must have had; I don't think in person.

Mr. Cohen. I move to strike out the answer of the witness as an umption

The Court I will let it stand.

O. At these different meetings what was the subject of discussion d conversation among these different people and officers of these fferent concerns, relative to the making of that agreement or any neement?

Mr. Cohen. That is objected to because it calls for a statement of general conversation.

The Court overrules the objection and counsel for defendant exots to the ruling.

A. The first talk, the talk at the first meeting was largely indulged between Frank Fargo and Mr. Gates of the Creamery Pr nufacturing Company, and Mr. D. H. Rowe, and Mr. Swaney or two others; but they were the main talkers about what the obof that we were trying to get at was.

Mr. Cohen. I object to the answer of the witness. The question s what the talk was about-

Mr. Cohen. Not what you were going to talk about, but what did

you talk about?

Witness. The subject brought up was to eliminate competition, and get larger prices for creamery supplies, or, on the other hand, to reduce expenses. The controversy that I took part in myself was that we would not reduce the price, but reduce expenses, maintain prices as they were and reduce expenses which would give us larger profits; but the talk of a great many others was that by combining they could get better prices for everything that was controlled under the patent. The argument lasted a good many hours as to which plan they would adopt.

Q. Can you give some of these different plans that they discussed?

Mr. Cohen, That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants ex-

A. No. I cannot.

Q. You say this was discussed at the first meeting A. Yes, sir.

Q. That was held in Chicago? A. Yes, sir.

Q. And you say that was about five months before February 24,

A. It was about that time, that was the first meeting I attended.

Q. At the subsequent meetings that were held from that time on until the 24th of February, 1898, you may state what was the general subject of conversation.

A. It would run on the same lines of forming what was called a combination; that was the word that we used at that time. A further argument that was brought out was whether it would injure our trade if it was known that we did form a combination. Some claimed that it would hurt us if it was known, and others thought it wouldn't harm us if the creamery publications knew it; but the plan outlined by Mr. Gates, and he was the brains, as we considered it at that time, and his ideas were followed out largely, the plans outlined by Mr. Gates the president of the Creamery Package Manufacturing Company, were followed largely, as he was the brains in the formation of that combination.

Mr. Cohen. I move to strike out the statements of the witness to Mr. Gates, as immaterial, incompetent and irrelevant.

The court denies the motion, and counsel for defendants excepts to the rating.

O. What was the plan with regard to keeping it from the public or letting the public know that the combination plan was adopted?

A. The greatest controversy was over the name that we were not the public product of the public public product of the public p

dept. If we adopted the name and each branch of the Creame

Package Manufacturing Company used it it would unter be known so a combination. It was agreed at one of the final meetings that ach house would retain its own name; by doing that we would not be known as a combination, but we would still do business under our own names, under our catalogues and circulars which were out it that time.

Q. You say the question of prices was discussed prior to Febmary 24, 1898, that is the prices which they could or would get for

heir goods after the combination.

A. On the specialties only.

Q. Can you give a little more fully the discussions that took place rior to the forming of the combination as to these prices?

Mr. Cohen. I object to the question as immaterrial and incometent.

The court overrules the objection, and counsel for defendants exepts to the ruling.

A. The larger portion of the conversation was with regard to the rices on particular articles which we called specialties; that if e could eliminate competition, and also stop the lawsuits which ere going on at that time and were very expensive, as far as my own ouse was concerned, it would be a good thing. If we could elimate that and also stop the federal litigation among ourselves. That as one of the strong points that was argued both by Mr. Fargo. d Mr. Gates.

Q. Was there any litigation going on between the Fargo Company d the Owatonna Company?

A. Yes sir.

Q. Was there any other litigation besides that among any of ose different concerns?

There was quite a number of suits started, but whether they

d got very far along or not my memory don't serve me.

With reference to the suit which you have mentioned between Owatonna Company andB. F. Fargo & Co., was that brought by E Fargo Company or by the Owatonna Company, do you remem-

The suit was brought by the Owatonna Manufacturing Com-

by I think

Against your company? A. Yes, sir.

Had there been any decision in the case on February 24, 1898?

No. sir.

It was still pending in court? A. Yes, sir.

Do you remember whether they had taken testimony or not? They had taken quite a large amount of it, but I don't know

bether it was district or not Q. It was a patent unit, was it? A. Yes, so. Q. Pending in Minneapolis, Minneapols?

A. The larger portion of the testimony I think was taken there.

Of these specialties, you have already said the F. B. Fargo o convolled the Views chara-

Q. What other specialties did other concerns control at the time this contract was signed. February 24, 1898?

A. The Cornish, Curtis & Greene Madg. Co., of Fort Atkinson, and the A. H. Barber Company of Chicago.

Q. Tell us what specialties The Cornish, Curtis & Greene Mfg.

A. They had the same line of specialties that we had, only made stee different plans and patents. Combined churns and butter emitters, creamery vats, milk weighers, milk testers, in fact nearly everything there was in a creamery. The same was true of A. H. orber & Co., Chicago, he having a full line of specialties of his own

Q. Did F. B. Fargo & Co., have as a specialty a combined churn ad butter worker?

A. Yes, sir.

Known as the Victor? A. Yes, sir.

O That was their specialty? A. Yes, sir.

O. Were these other specialties owned by the F. B. Fargo Com-

Yes, sir, they had several patents out on milk weighers, and I think two or three different kinds. They made quite a large ember of milk testers with patents on them, and also on cream vats,

Any separator? A No. sir.

O. Did they have the agency for the DeLeval Company?

A. Yes, sir.

O. What was the De Leval separator at that time?

A. It was a separator that was largely used by nearly every creamery in the Northwest.

It was a machine for separating milk from cream?

A. Yes, sir, cream from milk

O. When did that come on the market, if you know?

A. Alton the year 1881 or 1883.

blow large a share of the trade did that separator have on tel 3917 24, 1831

Mr. Cohen. This calls for your own knowledge.

In our immediate territory is had about ninety per cent of the

Q. Was the question discussed at any of those meetings as to what the effect of a raise of prices on those up, sittles, if it was made, would have on any other goods, if there were any need in the creamery trade not covered by these patents?

A. Yes, sir.

Q. What was the discussion about?

Mr. Coben. That is objected to as immaterial, and as calling for conversations had at many meetings.

The court overrules the objection and counsel for defendants excepts to the ruling.

A. I can only give you the discussion that I entered into myself.

Q. Give us that.

A At one of the meetings the question came up as to whether we would loss our trade, and it would go to the smaller houses,—there were a few outside houses—provided we raised the prices. I made a strong argument that we would not raise the prices enough to make any change in the prices of creamery supplies, but that we cut down our expenses and instead of having four or five or ten men go to sell a single article, one man should go there. That was my one argument against the rise in prices, first, last, and all the time, but it was overruled and the argument was that if they absolutely owned and controlled all these patents and similar patents, then the outside houses couldn't get them out, so it wouldn't make any difference. But I made these statements several times I think at that meeting, that if we did raise prices it would stimulate inventors, and they would have similar articles on the market very soon which would take the place of ours. I used that argument very strongly.

Q. What did Mr. Gates say in answer to your argument?

A. Mr. Gates as chairman very seldom made any arguments before the people. He held the chair, and the discussions were made by the managers of the different houses. This was prior to the organization.

Q. Was there any argument as to prices of other articles outside of specialties being raised by raising the price of the specialties?

A. There was a good deal of argument with regard to that, and we agreed that where a creamery wanted to buy a boiler or an engine separately, then we would only meet what we called local competition; we were free to go in and make a price ourselves which would be very close to what the local bidders would put in on the same article. When we bid on our specialties, then we would put the price at what we had orders from headquarters.

Q. What do you mean by headquarters?

A. Chicago, Illinois, the Creamery Package Manufacturing Com-

Q. Was the question of the effect of that arrangement would be up-

not in a complete creamiery outfit?

If all marchines used in a complete plant, including every

exemptor piping, shafting and belting and setting up all the
compensed with the insanfacture of cheese or butter, and medines in comping order ready for business.

- s, sir, engines, boilers and all things used in the creamery.
- Prior to February 24, 1808, that would include combined churus

- At that time was there anylody in the United States furnishing The two years prior were the best we had ever known.

  The two years prior were the best we had ever known.

Were there many complete creamery outfits installed about that

Yes, sir, a large munber.

Who were puritisg in complete outfits prior to that day of these

A. In our own territory there was the Creamery Package Manufacturing Company, The Cornish Curtis & Greene Manufacturing Company, and our own lesses F. B. Fargo & Co., then occasionally, J. G. Cherry of Cedar Rapids would have a salesman on the ground, and occasionally. ally Mower & Harwood would have a salesman, and occasionally A. H. Barber & Co. of Chicago, D. H. Rowe and sometimes others; but the three houses located in St. Paul and Minnespolis were the main ones that were lighting for the Northwestern trade.

Was there my discussion as to the effect on prices for putting best complete outfits, if you went into this combination plan?

They thought they could raise the prices.

because there were very few outsiders that could provide an

Why? A. Became they couldn't get the machines.
What machine couldn't they get?

They couldn't get the combined churns and butter workers, milk ners, milk separators and so on of the kant we manner get other kinds. Only the large number of specialties

What was said about some of these concerns which couldn't a crossistion if that plan was carried out?

the to the thining of this concern we need and our own spec-

sities, which we would metude at the time we trief in sell an outing for at this time of the meeting it was argued that if we had all these pecialics absoluted in one house then the outsiders couldn't get any of them, and we would have absolute control of the trade.

Q. You say that Mower & Harwood were engaged in putting in samplete outfits?

Yes, sir.

Q. Did they have any combined churns and butter workers?

A. They were jobbers only on the market

Q. What churn and butter workers they used they had to buy from the combination?

A. They had to buy a combined churn and butter worker wherever

they could get it, prior to this combination.

Q. Was there any discussion as to what effect that arrangement would have upon Mower & Harwood in setting a complete outfit, it this combination was made?

A. Yel, sir.

Q. What was that discussion?

A. That they couldn't get the goods.

Q. And as to what effect it would have upon them, that is as to re & Harwood?

A. Yes, it would eliminate their trade.

Q. After this contract was signed on February 24, 1898, did you have anything to do with taking inventories of any of these different concerns which went into that combination?

A Yes, sis.

O. Which one of the inventories?

Out of the Minnesota houses, the house at Mankato, and the Creamery Package Manufacturing Company of Saint Paul. I had nothing to do with the inventory in my own house.

Q. How long were you making those inventories?

I think I was three days in Mankato and one day in Saint Paul.

Have you a general idea of the terms of that contract of Pebruary 24, 1898?

A. Which contract, which contract do you refer to?

Q. I said the contract of February 24, 1898.

Yes, in a general way.

Q. Was the plan outlined in that contract generally followed in taking these inventories?

Yea, sit.

O. After the inventories were taken, then you say you were transferred to Chicago?

A. No, sir, I was not transferred for six months.

were you tong in the meantime?

- the second manage of the Stin Statistics of the Steam desge Manufacturing Company about he F. B. Page & Co. That same name seas used in cave incide the bolices?
- I After that day you received all your orders and autroctions. on Cheer, the year
- our tries to see from the flat, which I will
- What was done if anything directly after making that contract regard to your traveling salesmen on the road?

  Cohen. That is objected to.
- They all got new instructions. How many traveling men did you say you had when the con-Constraint Constraint
  - That he was ton a fee
  - And howevery did you have after the contract was algoed?
  - I kept the same mention a time i
- You say that new instructions were b to these traveling
  - Yes, ser
- From where? A. They were instructed from me.
  Where did you get your instructions? A. From Chicago.
  Did you instruct them orally?
  Whenever they were in the house I did.
  What instructions did you give them that you so received from
- Showed from the in bruckers that go strong chicago ma had diein read their over
- O. When you say from Chicago, do you mean the Creamery Pack-ee Manufacturing Company?
- What were those instructions that you gave to your craveling
- Mr. Cohen. I object to the question because the instructions were
  - THE COURT STORY IS NOT THE PARTY OF
- He Leach it shows how they carried on their trade from that one it shows the him they had after that date, and shows their tion is calling the prices on complete outfits, and we propose to show a toleral time were obtained at the different bouses for these outfits.
  - Charge Tourish on tamage in this section is reason of their
  - THE STREET STREET, STREET STREET

the Fact. I will overrole the of

sed for defendants except to the ciliar

e instructions that you give so your lim

A. The metro-close were that we were to get the prices which were accomps sying this letter, and that we seem follow at the immediate liberally in that letter, with the sax aption of when we met what we called outside acceptance; then prices were to be made by the parties on the ground, so that if we got the order we would get it at a profit, and we ld make the other fellow take it at a loss.

What do you mean by outside competition?

People who were not connected with the combination
After February 24, 1898, how were your prices in ared with what they were before, for the pools that you is there the same goods?

Mr. Cohen. Phil i objected to its immaterial and irrelevant

The court overrules the objection and commel for defendants excepts to the ruling.

A There was a raise of from 10 to 38 per cent.

Q. Were there any instructions given to your traveling men as o what they should do in case two or more of the traveling men han to hid on the same couffit, that is traveling men from lith event companies?

A Year sir.

O. What were those instructions?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The court overrules the objection and counsel for defendants excepts to the ruling.

A. The instructions to the traveling men who came from the law managers in Saint Paul and Minneapolis, we arranged as to which one of the traveling men was to take the order, take it in rotation

Q. What was that system of rotation?

One man would be instructed to put in a price which was the price that he wanted to get. The other two were to be somewhat argues as that if they bought from the lowest bidder the man would consider belonged to him and he would get the deal. Then the next man would get in the same way, that was done so as to equalize the trade lativate the time bouses, as sear as we could. the three hop

Q. What were the instructions at to what these traveling mea-absold to with regard to representing whether they were from dif-ferent bourse or from competiting bouses?

Mr. Cohen. That is objected to at introducing, and also it confi

for writen instructions which are not produced at the time.

The court overrules the objection

- A. We were instructed, and I gave instructions to my men that they were to represent that they were still traveling for F. B. Fargo & Co., and that the goods would be shipped from F. B. Fargo & Co., from the factory and that the bills would be collected by F. B. Fargo & Co.; we were still F. B. Fargo & Co., but if anybody would ask us about any combination we didn't hear them.
- You say at the time that contract of February 24, 1858, was signed F. B. Fargo & Co., had the Victor churn?
  - A. Yes, sir.
  - And a number of other churns?
  - They had a number of other patents.
  - Did A. H. Barber & Co., have a churn? A. Yes, sir.
  - O. Did the Cornish, Curtis & Greene Mig. Co., have a churn?
  - Yes, sir.
- O. Do you remember if the Cornish, Cartis & Greene Mig. Co., had the Wizard churn?
  - A. I think that was the name.
- There was also a churn made at Owatonna by the name of the Disbrow churn, was there not?
  - Yes, sir.
- Q. In these meetings and the talks you had before the making of that contract, was it discussed as to which ones of these churns, if any, you would still keep on the market?
- A). Yes, sip, there was a meeting in Chicago when that was talked
- At this time do you know whether the Creamery Package Mannfacturing Company was the selling agent of the Owatonna Manufacturing Company's churn?
  - A. It was the only one handling the Disbrow churn at that time.
- Q. Was it discussed about these churns, and what was said if anything about it?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The court overrules the objection and counsel for defendant excepts to the ruling.

A. Yes, it was during one of the meetings in Chicago, I think it was hold in the office of AAR Barber, Mr. Frank Fargo was present, Mr. A. H. Barber and A. F. Hold, and I think Mr. Gates.

Mr. Frank Fargo had myself go with him. We were arguing as to the relative value of the patents. Mr. Fargo wanted I should help him out to get as much out of his patents as possible, and we had a long argument about it; but it was finally decided before the meeting broke up that there would be only two churns manufactured and sold after the making of the agreement. These two decided on were the Victor and the Disbrow. Mr. Barber wouldn't agree to that at first, but finally agreed to lay his churn on the shelf and not manufacture it.

Q. What about the churn known as the Wisald churn monufac tured by Cornish, Cartis & Greene Mfg. Co.?

A. They were eatisfied to take the price offered, if I remember

right, for their patent, without going ahead and manufacturing.

O. After that conract was made were there in fact any more Barber churns manufactured and sold, or any more Wigard churns manufactured and sold?

Mr. Cohen. That is objected to as immaterial and incompetent.

The court overrules the objection and counse for defendant excepts to the ruling.

A. There were some of them sold, because they had been made and were in the warehouse at the time of the combination; but there were no more made except for the purpose of finishing up what extras they had on hand. I think they did finish out their stock but no more.

Q. After this contract was made did you know of any negotiations had or any talk at any meeting of the directors of the Creamery Package Manufacturing Company as to stopping or with reference to the A. J. Cushman business at Waterloo, Iowa, was it discussed and considered?

A. Yes, sir, I was at the meeting.

Q. Cushman was doing business at Waterioo, lows? A. Yes, sir

Q. Was that near where you formerly lived? A. Yes, sir.

Q. Mr. Cushman had not been in that combination, had he?

A. No. sir.

Q. Will you tell what that discussion was at that meeting of the directors of the Creamery Package Manufacturing Company at which the business of A. J. Cushman was considered and talked about?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court. I suppose it is admitted that the Creamery Package Manufacturing Company bought out Mr. Cushman.

Mr. Cohen. Yes, sir, that is admitted.

The Court. What is the object of this evidence then?

Mr. Leach. We think it shows the general plan and the general scheme of the Creamery Package Manufacturing Co., that there was plan to get rid of all competitors who were engaged in the business and had any competition with the Creamery Package Manufacturin Company after that date. Some of the competitors they would but out, and other competitors they closed out by lowering prices. If the

couldn't buy them out they would use some other means.

The Court. Do you propose to show anything more by this witness than that the Creamery Package Manufacturing Company bought out A. J. Circhman & Co.?

Mr. Leach. Yes, six me wish to show the various ways of getting rid of these competitors, and that these vanious ways were discussed at these meetings. We offer this to show a general conspiracy.

The Court. I will overrule the objection.

Council for defendant excepts to the rolling.

A. At that meeting there was quite a large amount of argument as to what they would do with competitors who were interfering with the trade at that time, and the Cushman house was the main topic of discussion. My memory is very good upon that, because I was solicited to take the general managership of it if I wanted it.

Mr. Cohen. That is objected to.

Witness. I wouldn't take it, because the competition had been fierce there, and I wanted a house if I had one at all where I could make a showing. I refused to take it, and told them I didn't think that they could make the house pay the way they had been running it. The argument way soon came to a point where they made up their minds that it would be cheaper to buy him out, even if they had to pay a good price. Both Mr. Curtis and Mr. Fargo and myself were strongly of that view, because Mr. Cushman had been a very heavy purchaser of our good, and we had very close relations with him. We thought it better to buy him out them to have it go on as it had been going on for the last few months. There was no money in it for us to continue it the way it had been running. My advice was to buy him out and parties were sent on the night train that night, and the purchase then was made imide of forty-night hours.

was made isside of forty-night hours.

O As that meeting when you were comidering the Cushman business were there any other means proposed of getting rid of his business than by buying him out?

Mr. Cohen. Answer that question yes or no.

A. Yes, sir, there was

Q. What were they?

Mr. Cohen. That is objected to as immaterial and irrelevant

The court overrules the objection, and counsel for defendants ex-

A. Some of the parties were for cominging low prices, and cutting mices in that vicinity, and driving him out of the trade by that pro-

O. Out of what vicinity?

- A. Just the vicinity of Warring Vicin Str. to 10 materials.
  - Q. Was the house to a good part of the country?

- A. Yes, sir, it was in a good part.

  Q. Did you hear any discussion as to any other competi-Cushman after that date?
- A. It I did I don't remember of it now, for the reason that I was interested only in that one, and they a same that I should take charge of it.
- Q. After this contract of February 24, 1808, was made, what effect did it have upon competition which had heretofore existed in Wiscomin, Minnesota, and the nearby states, in the sale of these creamery goods in that territory?
- A. There was not much competition from outside houses; there was some, but not a great deal, if my memory serves me right. I don't think there was a third of the competition from outside houses after February 24, 1898, that there was before.

Q. How about competition on specialties after that date?

A. During the summer I don't think there was any competition on those specialties, as there were no others. I don't think there was any other on the market. I don't remember of any.

Q. What part of the business in that part of the country was done by the Creamery Package Manufacturing Company in the sale of specialties after February 24, 1898?

Mr. Cohen. I object to the words "In this part of the country," as not being sufficiently definite.

Mr. Fry. Specify the states,

Witness. In Wisconsin, Minnesota, Iowa, South Dakota, Illinois, and the states to the west of them.

Mr. Leach. I am confirme it to the competition in specialties in any of the states which you have mentioned.

Mr. Cohen. That calls for your knowledge.

A My knowledge for six months after the combination would be confined to the Northwest.

What states do you include in the Northwest?

Maineseta, Wisconsin and the Dakotas.

Q. What is your knowledge with regard to them?

The Creamery Package Manufacturing Company and their exple that went into the combination with them had fully 85 to 90 cent of the trad

O. You count all trade, or is that, the specialties?

A. That would be the specialties.

Q. What part of the trade did they have in this territory, in par-A About the same per centage.

A. About the same per centage.

Q. About what part of the trade did they have in that territory in the sale of other articles which were into creameries, and which were not covered by patents?

A. In the line of supplies I guess they had it all.

Q. After Pebruary 24, 1898, and while you were still in Saint Paul, did the house at St. Paul continue in apparent competition with the house in Minneapolis? A. Yes, sir.

How was that apparent competition kept up?

A. By sending a salesman from each house to the same place to get the order, to get the outfit order, or to get an order for specialties when only one specialty was purchased.

O. What about the plan when a purchaser came to your house in Saint Paul, and also came from Minneapolis?

A. We considered if the customer came to our house first, that would be the house he would prefer to buy from. The manager of sales, the manager on the floor would make him a price, and immediately telephone as soon as the man went away to the other house to protect him on the price, and they would make a different price or a little higher, so as to protect him.

O. When that proposed purchaser came to your house after going to the other house, or other houses, after they had received that

message, what was your plan?

A. We would make a little higher price, and then talk a little strong that our goods were the best.

O. Was this plan carried out?

A. In a large number of case. We broke over it case it 4 while but not very often.

Q. Did you have a private wire between the Creamery Package Manufacturing Company's house in Minner polits and F. B. Fargo & Co., in Saint Paul?

A. Not while I was there.

O. Did you know of it? A. No, I did not know of it.
O. While you were attending any of the meetings in Chicago, of the Creamery Package Manufacturing Company, prior to February 24, 1808, did you ever see any of the representatives of the Owacoma Manufacturing Company there present? A. Yes, sir, Q. About when was it and whom did you see there?

A. I can only remember seeing one man, altho there were three them. It remember My-Howe, the old gentleman.

O. H. C. Howe? A. I don't know his initials, I knew him very

What was that meeting then being field for?

A. The discussion was largely between our own house and the Creamury Package Manufacturing Company, the only parties pressured that time were Frank Fargo, Mr. Gates and myself.

11. Tal. 17. (1). Phones; 24. 180

Years I couldn't tel you see four faire, but it was before that.

You say Mr. Howe was there at that time and two or three others from the Owatonna Manufacturing Company?

Yes, sir.

Mr. Cohen. You mean that two or three others were present at the

Witness. No, sir, I met them there, but not at the meeting.

Where was the meeting held? A. At Mr. Oate's office,

Where was Mr. Howe and the other men you told us about?

They were in the vestibule or in the doorway as Mr. Gates and Mr. Fargo and myself came out.

At that same place? A. Yes, sir,

The same office? A. Yes, sir.

Was there any discussion between you and Mr. Gates as to the Owatoma Manufacturing Company at that time?

No discussion, there was a conversation.

Was this conversation concerning a contract between the Creamery Puckage Manufacturing Company and the Owatonna Manufacturing Company

It related to a contract which he wanted to get.

What was the conversation?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Mr. Leach. I will withdraw the question.

O. What was the plan that was discussed by the directors of the Creamery Package Manufacturing Company as to competition and the continuing the use of the patent after February 24, 1898, that is the patent of the combined churn and butter worker?

Mr. Colien. That is objected to as immaterial, and as having been aldy gone over.

The Court Yes, I think that has been gone into.

## CROSS-EXAMINATION by Mr. Cohen.

Q. You say you have been living in Saint Paul since 1883?

Since 1893. When you at you were traveling on the road yourself you said you lived in lows? A. Yes, sir.

O. During what years was that?

- is think I commenced traveling on the cold for 5 th Turgo be a short the year 1983 or 1984. Assertment their their store about that
- And then pain similarly to the mode for the Prince of Co.
- Rebrussy 24, 1850?
  Not continuously, but used of the time.
  You were a list employ for practically five years before March
  - A. In Saint Paul, yes, sir.
- The two houses, the Saint Paul house and the Lake Mills were practically under the same management, were they not, that time?
- Yes, as far as the manufacture of goods was concerned, but set as far as the sake went.
- The combined churn and nutter worker was a patented device eads under various patents, and put on the market first in about Box or 1894, or maybe 1895?
- A. I think I heard of it in the latter part of 1892 or the first part of 1893, that was about the time I came to Saint Paul. I knew of one being made here somewhere about that time, I think it was about that
- Q. Some of these jurous may not know what a combined churn and butter worker is, will you describe it briefly?
- A. Yes, sir, a combined cheen and butter worker is a receptacle generally a round drum, most always about 31/2 feet in diameter and of varying lengths, the varying lengths make the various sizes; that is the first long would be say 150 gallons, and then you add another foot, and that makes it hold another 100 gallons, so the longer they are the larger the capacity is. One set of castings would generally answer for about two sizes, that is we used to consider it so. When you get to the larger sizes you have to have larger and stronger castings, and larger and stronger frames. Then the cream was put into this drum, and inside of this round drum—there is probably twenty-five different styles and makes of them—inside of this drum were rollers, as they call them, some had one roller and some had two rollers, and some one roller and a shelf. The rollers were usually stationary during the charming process and the shelf carried the cream so as to churn the butter. When the butter is ready for working,—under the different rocesses and the different patents, the rollers stood stationary, by diflives at a lower speed, and the butter is made to revolve by differ-t processes; and the butter is worked by those treams. The process working the butter is done by time, as a rule. We used to figure of a man had to see the butter in order to work it property, but the

combined chitin and better worker is use made up that subody can see the batter, but it is a matter of minutes and seconds, counting for the length of time the butter should be worked to give it the proper amount of working. The different styles all look alike practically on the outside of the drives, and that way one churn is shout the same as the other, but inside is where the difference may some in, and the difference in the gears and in the different fittings in the different churns.

Q. Now, I will ask you whether you were familiar in your work and in your business with square churns.

A. Yes, sir, very familiar.

Q. That was not a combined churn and butter worker?

A. No, sir.

Q. The square churn was in us., was it not, for a long time before the combined churn and butter worker?

A. Yes, sir; is was nearly the only churn in use for a great many years prior to the combined churn and butter worker.

Q. So in fact the combined churn and butter worker superseded the square churn? A. Yes, sir,

Q. In 1898, at the time when this agreement of February 24, 1898, was made, how many churns, combined and churns and butter workers did you know of?

A. I think about somewhere between eight and twelve,

Q. These combined churns and butter workers that you knew of were all under different patents of the United States?

A. I presume they were.

Q. Tell the jury all the combined churns and butter workers you knew of before that agreement was made.

A. There was three different kinds which had been made and put on the market by P. B. Fargo & Co., under three separate patents known as the Fargo churn; there was one made by the Cornish, Curtis & Greene Mfg Co., of Fort Aikinson, there was one made by the A. H. Barber & Co., of Chicago, there was one made by D. H. Burrell, of Little Falls, New York, and one made by the Owatoma Manufacturing Company, known as the Disbrow, there was one made by the Disbrows, I think at Mankato, known as the Winner, and there was one made somewhere in the East, I think at Schnectady, New York, known as, or I called it the round barrell churn, I don't know what the name of it was in the trade. There was also one made by Passes & Campbell of Belleville, of Dubuque, Iowa.

Q. That was called what?

A I don't know whether they were made under their own patents, whether they were making it for someone else; I remember seeing someone coming from there.

O. That was a churn called the Dairy Queen, was it not?

A. I don't think that was the one, though it might have been. I member seeing the churn once.

O Were they all made bufore this contract was made?

A I think there were others, but I can't remember,

Do you remember the Fenner churn?
I had someous of it, but I had never seen the churn in work-

Have you ever seems Renner churn?

I don't think so, I have only seen a model.

I think I have seen a model; there are so many of them, I can't designate them.

Do you remember the Squeezer churn? A. Yes, sir.

Who made that churn? A. Sharpless & Co., of Chicago.

Was that on the market before this contract was made?

A. Yes, I think it was on the market, but I wouldn't say certainly whether it was before or after. I think it was before, but I wouldn't be positive about that. I know the first one I saw was at Des Moines, lowa; I don't know how I would be there unless it was before.

De you remember the Noiseless churn?

No, not under that name.

O. The patentee was Stateler

A. No, sir, I don't think I can recollect that.

Q. Did you ever come across the Surprise churn?

A. Not under that name.

Q. In the territory you just spoke of, which I understand is Minnesots, Wisconsin and the two Dakotas, just prior to the making of this agreement, the Disbrow churn was in high favor, was it not?

A. Yes, sir, I think it was

Q. These Fargo concerns were not selling the Disbrow churn at that time? A. No, sir.

Q. You have spoken of some Fargo patent on a combined churn and butter worker, under which they were making Style A and Style B machines; and I think you spoke about the Anderson too.

A Yes, sif.

The Anderson churn was itself superseded by Style A and SEER

The Anderson when it was made was not a churn, it was just butter worker.

Q. Just a butter worker? A. Yes, sir.

So as a butter worker, it did not continue in the market after ne manufacturing the Style A and Style B churn?

A. With a few of the factories it did.

separate butterworker was superseded gradually by the

combined churn and butter worker, was it not? A. Yes, sir. Q. The Style A churn was the subject matter of litigation h the Owatoms Manufacturing Company and the F. B. Pergo Co., was it not? A. Largely, yes, sir.

Q. And the style B, both of them?

A. I think they were both included.

O. Now, before that litigation began the Fargo people did not have the Victor churs on the market at all, did they?

A. No, not on the market

O. When the litigation about the Fargo style A and style B machines began, was not an injunction issued against Fargo?

A. Yes, sir.

Preventing him from manufacturing either of these two churus?

A. Yes, sir.

Mr. Leach. We object to that, because it is not a fact; the record shows it is not a fact, and it is not the best evidence. The injunction was against style A and not against style B.

The court overrules the objection and counsel for plaintiffs excepts to the ruling.

O. There was an injunction against both style A and style B, according to your best recollection?

A. I don't know as to style B, I am positive it was as to style A.

Q. Was not originally an injunction got against style A and style B?

A. I don't know, for the reason that I didn't handle only one or two of style B.

O. That is, when the injunction came against one of those machines or both of them, the Fargo people began manufacturing the Victor, and put the Victor churn on the market, isn't that so?

A. There was about two months between the time the injunction was served on me before I had some other churns. I couldn't tell you whether it was the Victor first or not. There was about two months etween them.

Q. Have you the date in mind when the papers in the suit were served upon you?

A. I think it was April, the same spring.

Q. The spring of what year?

A. I couldn't call it to mind now; I think it was 1805 or 1806.

Q. Now at some time after that suit was begun the Victor churn was first put upon the market, but you don't know exactly how long that was.

A. I think the first one I saw was sometime in August.

Can you tell whether it was 1896 or 1897?

A. It was the same year the injunction was served on us.

this took (1965) to A. It consides therefor an opposition to be because and more presenting to the other than their test find that CARE FOR RIGHT TO COME AT ANY ARCHARGE TO CANADOLS. र्मक प्राप्त क्षा संस्थान प्रस्ति स्थापन प्रतास स्थापन Do you littly what churas were in use at that time in New A. Yes, ur, hargely, A. Bustern makes of churus; very few of the Western makes of A Very few Western made chures? Yes, sir, very few Western made churas. O. All the churne that you have mentioned are Western made chuses are they mis? A. With the exception of one made at little Palls, New York, the Burroll dury. Q. To that the National Shuth? A. No. sir, the Simplest, G. Yang hangeless goes then to the accent that these same chains that here being their than the property and the tradeous week too. want been to guy buch solunt t A HE AT THE END HAVE CHIEF WHE WAS EAST Minerally self to Year to G. What chatten were being ment in the East at the time this enttests was made? A. I can't give you the seem. I heavy that very less combined alterno, and better workers at that time but been chapped each of Miles, who undertuck to say, in your testamony, what percontains of the beam-se was there in that part of the country down that he is a second of the country down that he is a second of the country of the second of the country of the second The Parties to the States which the Serie Folker Within the State States the State State of the THE THE PARTY WHEN YOU And the term becambed to this Country backup Maintenance in the second to the following a few of the country of the second to th S. Williams The state of the first that the back is there have MANY A WAS STORY The said has with 1-24 the few the street

Do you make it was the same the same and the same on their section. White The woman's the rate, who there is substituted below to the if y and the Alapane A three and process are select about decreased. A three again. A think a pooling consequently decreased decreased by The restinct in another case here, and you was A. A think so in all of them. Q. You testified in the said brought by the state of Municipals against the Commery Peologic Manufacturing Company, disk you not? A. Yes, with 2 this

Q. Did you not testify there that your knowledge, to any substantial amount, coded when you ceased to be manager at finish Paul?

A. My personal knowledge I think I did testify suched to because I took a position with A. tt. Barbar & Co., as manager of the refrigerating department; but the party who sat next to me, within a couple of test of me in A. E. Berber's estationy department, we constructed delty, we must together there.

E. Bill will say your personal topologies unless there?

Michigan in heart knowledge, by they be the season or take that them havest.

While the say when the weeks have as it and become in prior de pais many in bandly to got increase to prior interespents to beganning to class? As I then t undercomed the quantities.

(2) When you testified here as to increases in prices after Webrenew and March (Bull, do very retain to lestily to say lacross in price hiter than September to 1996?

Not on orders that I took myself or copied.?

Do you mean to bestify as to anything beyond that period?

To not general longs being prices were maintained.

To our country to the country to the country of the 

and with growing to within the winds theming the or the A. A. the translation than ?

(a) I maked your exhibits your hearthest to their winder, to the william

which I have send to seek. A. I think I did. HOW MANY SERVICE SERVICE SERVICES

ns Chicago belong Habrinary 24, 1848, you were there

I was general manager of the baint Paul busine. Of the F. B. Fargo Company bouse? A. Yes, els.

Were you notified to attend those meetings by Mr. Frank

Mr. Frank Wargo usually asked me to come to Chicago whene west down, and whenever it was convertent for the I went

low were not an officer or a director of the Saint Faul Vario

the territory of the consider a General Manual an Officer

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officeria) is then it was private to this think.

The team? A. They side

he year that or inform?

while t tell you whether it was before the harimning of the they year, but it was along about the time when we were talking

ne my actor the assessment, was made; there is wear rec-

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making the same stay for a probability throughout

at the second it will be seen to be a second or a second to

Q. And it time of their investment that you executed is true with will it not that that competition would be competed to supply at their smaller concerns?

A. Rubinous to the smaller concerns?

No, there was no amplier concern represented, that is, what we considered a unaller concern.

Q. Was it not said at that mosting, or at any one of the mostings that it would be advisable to make this agreement, because the scenpetition was ruleous to some of the smaller concerns?

A. Is was ruinous.

Q. Was it not so stated at that presting?

We blue with reference to the pusiller concerns, I don't think that

was the word—it might have been.

De I will sele you adulties you testified in that same mate same to light course. Where you have appeal the specific the view presentants. ne en unique think was the the Petitle? Beforeing his east obligation breathful sid der von der smenet ifthe decidation was be diministration of the way considered returns to seem weakers and streether becomes no their blank." ENd you not kny than ?

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Was it some?

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the transfer and the state of the state of the transfer to the

Q. What do you mean by smaller houses?

A. Smaller houses are people who only handle little goods, like handling goods that are handled in a handware store where they are handling butter tube and such like. That is what I meant by smalle,

O. Your answer referred only to those concerns that were con-templating going into the agreement, and of those there were certain will's and weaker busses, certain houses that were smaller and weaker than others?

A. Yes, sir, that was my meaning of the question; smaller and weaker houses that were going into this combination.

O. And the competition at that time was so intense and so fierce between these houses, in the territory with which you are familiar at that time, that that was considered as one of the reasons why the agreement should be made.

A. Yes, sir, that was it.

Q. Prior to the making of this agreement of February 24, 1898, prices had become very low in some instances, had they not?

A. Yes, sir.

O. So as to practically est up all the profit there was in the business? A. Yes, sir.

O. Competition was very keen?

A. Well, prices were not low enough to eat up all the profits, but the expenses are them up, the expenses would eat up the profits.

Q. The expenses would sat them up? A. Yes, sir.

O. And the result was that the profit was not a reasonable, fair and legitimate profit at that time, was it? is that right?

A. Some of the firms considered there was not a legitimate profit.

Q Did you not say that occasionally they would make a profit of less than five per cent on the sale?

A. A sale was made at a profit of less than five per cent?

Q. Yes, A. In certain instances I think sales were made at less than that

O. That was the result of your having to meet competition?

A. Outside competition was killed.

O. You had no outside competition before the agreement was made?

A. Yes, sir, in outside states. We tried to drive competition outside of the states, and keep the business in our own states.

Q. And that agreement being made, you had in the hands of the Crusmery Package Manufacturing Company two churns, the Wizard and the Victor, and these two churns were what you built largely afterwards? A. The Wisself and the Victor?

Q. Ves. A. No, sir. The Disbrow and the Victor were-

Q. The Distrow and the Victor? A. Yes, sin Q. The Wisard you don't know much about, do you?

A., Not a great deal, it entered into competition I think during one

Q. During one season? A. Yes, sir.

O. Do you know anything about the qualities of the Wizard churn?

A. No, except that it was easy to dispose of it and replace it with one of our churns after they had used it a while,

Q. In point of fact the Victor chuse was a better church than the Wizard chura? A. No, sir, I don't know that it was.

Q. Did you houestly consider it so?

A. We used to say that in competition.

O. As to the Winner, did you meet that?

A. Yes, at one time, when it was made.

Q. Do you know whether the Wigard churn was manufactured under a patent or not?

A. I couldn't say that I would know, but I was told. I was told by the manufacturers that it was. That is as far as I know.

Q. The Winner, do you know whether that was manufactured under a patent?

A. I think I saw the patent afterwards. I didn't know at the time it was made whether it was a patented article or not.

Q. Then there was a lot of competition over the Winner, was there not?

A. Yes, sir, there was at one time.

Q. The business at that time in 1898 between the creameries and the parties supplying complete outfits, consisted in the making or manufacture of and getting a contract to furnish complete a whole creamery, isn't that correct? A. Yes, sir.

Q. Now, there were a good many things that went into the furnishing of a complete creamery, that could be supplied anywhere, were there not?

A. In dollars and cents it amounted to about one-third of the total value of the time.

Q. That is, things that could be got anywhere? A. Yes, sir.

Q. And the rest of it was what you call specialties, or patented articles? A. Yes, sir.

Q. Those specialties consisted, as you have said, of churns, vata, milk testers, milk weighers, and so forth, and separators.

A. Yes, sir.

Q. A separator was a large machine that was quite essential to a creamery?

A. At that time they had to have one in every creamery.

Q. Since that time the large separator has been supplanted by

hand separators? A. Largely so.

Q. To a large extent? A. Yes, sir.

Q. And the cream is separated outside of the creamery?

A. In a good many cases.

Q. You have said that the F. B. Fargo Company concern at St. Paul were selling DeLeval separators? A. Yes, sir.

Q. And the Cornish, Curtis & Greene Mfg. Co. were selling De Laval separators, were they not?

A. And the Sharpless separators.

O. The Creamery Package Manufacturing Company was also selling the De Lavai separator and the Sharpless separator?

A. It was selling the DeLaval separator.

Q. What other separators was there?

A. I think they sold a few of the Reid, but I am not positive. They were sold by somebody, but I am not certain whether they sold them or not.

Q. There were many separators on the market, were there not?

A. Yes, sir, there was half a dozen different kinds.

Q. I refer now to large separators. A. Yes, sir.

Q. That is, power separators?

A. Yes, sir, power separators or the large separators.

Q. Weighing devices, milk testing devices, those were sold wherever they could be sold.

A. Yes, there was a good many of them on the market.

Q. A milk tester would come out today and be supersed tomorrow by something else?

A. Almost as quick as that but of course not quite. It was im-

proved almost daily, it was a new article.

Q. So it was quite impossible to get any particular control of the business as to any of these smaller articles?

A. No, they were controlled largely.

Q. Controlled the articles themselves?

A. The milk tester was not a controlled article. It was not a patented article. That is, the principle was not patented.

Q. The general principle of the milk tester was open to the whole

world in 1898?

A. Yes, sir, and prior to that time, long before that.

Q. It was invented by Professor Babcock? A. Yes, sir.

Q. And he threw it open to the world?

A. Yes, sir, the principle.

Q. The competition then before this agreement was made between the F. B. Fargo Co., and the Creamery Package Manufacturing Comlany, was in fact to get specifications of the particular churn that such wanted to sell, as a part of the general deal, and if they had that it wouldn't make so much difference as to the rest.

A. We would try to get them to specify the article that we had, and the Creamery Package Manufacturing Company would try to get them to let them specify in their bid the article that they controlled, and the Cornish, Curus & Greene Mfg. Co., would try to let them specify the article they controlled.

Q. These were your specialties and each one of you had a specialty, and you wanted to get them to specify the article-that you dealt in.

A. Yes, sir, as a rule, they would make up a list of their own, and then force us to bid on that list; but as a rule it would include a DeLaval separator, and in most cases they would leave the combined churn and butter worker open, because competition was so fierce that we couldn't get them in all cases to specify either a Victor or a Wizard or a Disbrow. But we could get them to specify the separator, and we could get them to adopt the boiler and engine and so forth and if we could get them to adopt the churn that we were handling we would generally get the bid. That is about the way it was.

Q. So as the business was carried on before February 24, 1898, the man who got the inside track on the churn, had the inside track

on the bid?

A. It was largely so, yes, sir.

Q. You said, as I understood you, that after this agreement was made, and some time in April or May, 1898; there was an increase in price, which, as I recollect it, you fixed from 10 to 35 per cent?

A. Yes, sir, there was.

Q. Was that increase in price on the specialties?

A. The large portion of it was on specialties.

Q. A specialty like a churn had a fixed price before.

A. Each firm had a catalogue price, according to its own particular size and capacity of that churn.

Q. The list price of the same size was substantially the same, was it not, in all thes churns?

A. It was. As soon as we could get their measurements, we would take their catalogue and their measurements and compare the measurements; we would take the length of the Disbrow churn and take the length of our churn, and make their No. 6 our No. 6, and claim the same capacity for ours as for theirs, and they would claim the same as we did.

Q. Do you know of any increase in that list price?

A. Not in any catalogue list, that is, I mean there was no increase at that date in the catalogue price. We used all the same literature as long as I was with the house.

Q. Now what you referred to as being a raise in prices was not

O The Starpes Court, 127 Blood 2500 sold at a fixed un

A. The Sharpless was sold at a fixed price.

O. And the De Loral separator was sold at a fixed price, was it not? A. We were supposed to get a fixed price.

O. When you made your bid at whatever price you sold the separator severtheless you sold the De Loral separator at a fixed price or contract price, as far as that was concerned?

A. On a tump bid you couldn't tell whether it was the full price or a cut price, because the prices were not carried out on each article,

they never were.

O. But when you came to settle with DeLaval you had to stle with him at full price, because he insisted upon getting the full rice for his machine?

A. No, sir, it was the wholesale price; they never knew whether Deat the full price or not, but they supposed we did:

Q. When you spoke then of an increase of price of from 10 to 15 per cent, did you mean to say that it was mainly in the specialties, or did you mean to say that there was any part of that 10 to 35 per cent, on the ordinary supplies?

A I meant that figuring up the total amount that the outfit would come to, we added from 10 to 35 per cent, on the specialties, for instance we would sell a No. 6, combined churn and butter worker, I think the list price was \$210 or \$220, and we had to put that in at \$250, or close to that figures, but after Merch 1st, visible are cent then \$150, or close to that figure; but after March 1st, 1898, we put them in at list figure, except a discount for cash, which I think was seven and one half per cent. I think it was, I wouldn't be certain about that, it was either that or to per cent.

Q. As I understood you, you said you told your traveling men when they were asked as to combination, that they should not hear that? A. What is that?

Q. I understood you to say that when your traveling men were saked as to whether there was any combination among these various concerns, you told them that they should not hear that.

A. We were not to discuss it any more than possible.

O. When you were asked whether there was a combination between these various houses; did you say that there was not any combina-

At I told then that we had a gentlemen agreement, and I would ed turn the subject upon something else.

You told them you had a gentlement's (agreement). A. Yes, sir-

Q. You didn't conceal the fact that there was an agreement?

A. I didn't tell them there was no agreement. I told them we

had an agreement that was in the form of a gentlement contract, a sort of combination, but the question was generally evaded if pre-

Q. But if the question was asked you "In these any combination or arrangement between F. B. Fargo & Co., and the Cornish, Curtis, & Greene hig. Co.?" you said there was a gentlemen's agreement between them? A. Whenever I had to answer it I said that

Q. Is that right? A. Yes, sir, whenever they asked as about it.

Q. You never told them a lie about it?

A. I wouldn't lie directly. I would try to evade the question. I disn't want to answer it.

O. But you didn't lie directly to them?

A No. I didn't want to answer it.

Q. But when you really had to answer it, you said you had a gentlemen's agreement, a sort of a combination? A. Yes, sir.

O. Is that right? A. Yes, sir.

Q. What did you know about Barber's churn, did you know anything? A. Yes, sir.

O. How many of Rarber's shurns were made before March 1,. 1898? A. I don't know the number of them.

O. Do you think there were more than fifty?

A I couldn't say, they didn't come into my territory as much as the Disbrow churn did; although I was in Chicago a good many times in Mr. Barber's office and saw them, but how many were made I don't know.

Q. Do you know anything about the merits of the Barber churn, do you know anything about that?

A. As far as I know I considered them very good.

Do you know anything about it?

A. Only as I saw the machines fully made standing on the floor. I don't think I ever saw but one in a factory.

Q. Are you aware that creamery men wouldn't have these churns, didn't consider them's practical machine? A. They took them.

O. They took them, did you see many of them in use?

A. Well, I saw some

Q. Did you see 20 or 10 in use, do you think? A. No, sir.

Q. Or five? A. No, sir.

O. But you do know that they did use them?

We were in competition one season for about twenty outfits, and I think about half included the Barber churn, and about half the Disbrow churn.

Q. You think about half included the Barber churn?

A. Yes, sir, and about half the Disbrow churn.

Q. You wouldn't be very positive about that would you?

A I think about half were Dubrow shot half Burber.

O It appears that Mr. Dube, one of the members of the firm O. Would you state that every put out 20 out of this 40 on these

competitive orders with you

A. I wouldn't say as to that "What I mean is when these specifihad a copy of the order, and we included a Disbrow churn; we clinded a Barber charn, and we generally had a copy of their order. We generally had a copy of all the competitors bide, whatever they have

O. My question is whether your memory is that you did not rather exaggerate the number of Barber churns that came into competition

with you?

A. It is only from memory. I know that whenever a creamery company issisted on a Disbrow churn they wouldn't hear of anything else; and when they called for a Barber churn at a little less price they included the Barber churn, but whether it stayed there or not, I have no knowledge. As manager I received communications as to the hand of churn and kind of milk tester and kind of milk weigher they wanted, and the balance of things I cared little or nothing about, because I would send my own salesmen, and I would try to put in my own things if possible

Q. Did you ever see a Wizard churn work?

I don't think I ever did at a factory, but I might have, Did you ever see a Disbrow churn work?

Yes, sir, many times.

Q. You have seen more than 40 or 50 Disbrow churns working.

have you not?

A. I don't know the exact number. I have been traveling a good deal, and I have put in a good many creameries, and I have seen a good many Dishrows, I couldn't tell you the number though.

Q. After this agreement was made if a man came to your house wing stready been at the Minnespolis house, would you try to get

on order from him if you could? A. Yes, sir.

O. Would you try to have him change his specifications?

If I snew he was coming before he came there I would my and him naturally onto our class of goods.
You were in competition for that class of goods?
Yes, sir, at a higher price.

At a higher price? A Yes, sir.

Would you put in a bid for that man on different articles of nt kinds? A. They had to protect me.

If you could induce him to change his list to something clee?

A. If I could induce him to make a change so as to take our articles, I would have to make the same protection, according to prices. What I mean is I couldn't tell him a smaller size at a like price, without protecting the house that he had come from Q. Were you not in compension with the other houses on the list that he had from the other house?

A. No, sir, not eny. On that list I would try to change him from the Disbrow to the Victor charn; but I would sometime to get him to take a No. 3. Victor which would do more work than a No. 6. Disbrow.

Q. You could sell a Victor as against the sale of a Disbrow?

A. Yes, sir, if I got my price.

Q. I didn't quite understand what you said with regard to any discussion at these meetings before the making of the agreement of February 24, 1898, in regard to the control of prices as affecting other articles. If I understood you correctly there was some argument at one of those meetings that if you had the control of the churn patents, then no one else could come into Minnesota or into North or South Dakota or Wisconsin; and I think at one time you said that if there was any raise in the price of the patented articles that still inventors could go ahead.

A. I said that, but not with reference so much to combined churns as with reference to other articles. We argued at this meeting that the patents already on combined churns would cover the entire field.

O. That is where I want to ask you some questions. You thought of that time, that these Victor patents, and so argued, that the Victor patent and the Dishrow patent, and the other patents that were controlled and owned by these various concerns in the business covered the whole field in making churns, so there couldn't be any other churn

A. Yes, sir, we had a long argument upon that question. We considered that she patent held by the Cornish, Curtis and Greene Mig. Co., by Barber and Fargo, and those held by the Owatonna Manufacturing Company, which held the Disbrow, if we were to put them all together in one firm, we thought that we would control the world. We thought that the patents were so broad. We had a very long and spirited argument upon what they did include, and if they did cover all the business.

Q. This argument was made by whom?

Mr. Frank Fargo and myself.

Q. Did you have a patent expert there to tell you anything about e patents?

A. Mr. Frank Fargo had been down to Mr. Benedict, of Milwanse and inquired about it.

- That was an error, as our on you know more
- think as the second of the sec
  - And the second section of the second section of the second section of the second section secti
    - It has worked up since to be of some valu
- Of course year didn't have any idea that you could control the serie that let? A. Ven, we thought we could.

  Low thought you could?
- A. Yes, sic. We thought we could go abeed and work out Burrell.
  To thought we could drive them out of the trade by a superior ma-
- That is what you mean, you had such merits in those church The state of the s
- A. It was argued that if we made the Victor and the Dishrow, we could by all the rest of the petents on the delife and drive everywhere the out of the business with these two machines.

  Q. You thought you could drive them Out.

  - By having a superior machine.

    By competition with the other machines?

  - By lieving a better machine,
    Why are you so reluctant to admit that you and talk about legislegisters and relucing the cost2.
- That is all there was to it by having a cury in Acra claimed that the year tentors, that the set? A. We thought so at that time.

  And the Creamery Package Manufacturing
- And the argument was that with these two succilent machines was no possibility of anytody remaining in competition, because the archives of these two machines?

  I think we disought that with the patents we owned nobody aid be able to make a machine of this description.

  You know that there was
- O. You know that there were from six to ingit or ten to twelve other characterists were not in the combination?
- A No. air, we didn't know of all that number.

  C. How many did you know of pursonally?

  A Only the Simplex was in the market doing any business; and was only about four or five of these machines at that time
  - Have you not told me bery before that you knew of about less cerebe magnines either than these, that were in competition?
    - A his which they are seen and the wife in

But you told me there were machines there?

Aud von knew Meist flamt (A. Ya., die Vorkern, dem Mersteller deutste (dan A Yes, sir, but we considered them interior nucleises.
You didn't have every putest there before yes, sld you?
Mr. Pennis Purpo and them through Mr. Penedre.
Did you conside them? A. I think I know them over.
You locked them over? A. Yes, sir.
Looked over the patents? A. Yes, sir.
And read over the specifications?
You are send over the specifications.

sir read over the specifications of a good many much

So when you said a while ago you knew about these other so you meant you knew about them from having som the putet

A. I had seen the extents on them, and some of them I had seen chines themselves.

Do you remember what machines you had seen?
I had seen the Simplex.

in you had seen these patents shown you by Frank B. North Her 921'G0

A. There was very few that were making machines at that time don't recall who made these machines.

Q. You don't profess to say what machines were in the market in

c enet at that time, do you?

A. With the exception of one made by Mr. Berrell, and one made

Schenesady, New York, those are the only over I can call to mind, O. Your business was out here in the west and northwest with these are or four states? A. Yes, sir.

Q. You don't mean to say that you knew anything at all about the

nachines in the east, do you?

A. I went down there one or two years and looked the trade over the and tried to self some.

You say these machines would not sell there at that time?

I couldn't get them in at that time

Q .- There were others you say, state what they were.

A. The Simplex or Burrell's; there were very few of them in use, of any kind at that time, that is any kind of a combined chura.

A far as your knowledge goes, how was it in 1896? There was not over one creamery in fifty that had a combined hum at the time I was down there in 1958.

Before or after this agreement?

Prior to that time, prior I think.

Hors many did you see! At the time I met one of the state dairy inspectors who wa to the early for foly are this time who like the complaint estimate

Of There was according charm besides the Samples, was there are

A V think see any of them. There was usual of the Winners to my how large.

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Q. What else did you look over?

A. Well, among them were our own.

Q. This Victor patent?

A. Yes, sir, especially style A, which had been forgotten.

Q. Style A? A. Yes, sir.

Q. What else?

A. We looked over a drawing that was made by Mr. Penn of the combination, of the things that we thought covered the field.

Q. They were all Fargo patents?
A. Yes, sir, assigned to Fargo.

Q. So far as you have told us you only looked over the Fargo and Disbrow patents; what other patents did you look over?

A. I don't know what they were.

Q. Can you tell us one that you looked over outside of the Fargo and Disbrow patents? A. I think the Winner was in the lot.

Q. The Winner patent?

A. Yes, sir, the Winner, I think we looked at a description of it, or a cut of it.

Q. Were you aware at that time that the Winner was a Disbrow patent?

A. Well, I didn't know personally who was the owner of it.

Q. Then outside of the Winner, was there any other?

A. No, not outside of the Cornish Curtis & Greene and the Barber, but there were others that Mr. Fargo had from Mr. Benedict.

Q. Did you see them?

A. I saw them, but I can't remember them.

O. You don't remember the number of them? A. No, sir.

Q. Whether it was one, or two or three?

A. I remember the statement made by Mr. Fargo he says "Here is all of them".

Q. All of them? A. Yes, sir.

Q. They were all the patents that were used in the trials, or on hand it the trials, in the litigation of the patents that were in litigation between these parties, is that right? They were all the patents that were known and mentioned in the litigation between the parties up to that time, is that right?

A. The accumulation had been made by Mr. Benedict, he had got

copies of the patents from the patent office.

Q. Were these patents that you examined the patents that were referred to and under discussion and in litigation at that time? is that right? A. I suppose there were, I don't know where they got them.

Re-direct examination by Mr. Leach.

Q. This injunction about the style A churn was a preliminary infunction? A. Yes, sir. Q. It was not a permanent injunction or a final one?

A. I don't know what it resulted in. The papers that were served on me were a preliminary injunction.

Q. Did Cherry & Co., and Mower, Harwood & Co., have a combined

churn and butter worker? A. Not of their own.

Q. Did they sell any after June 24, 1898? A. I think they did.

Q. What was that?

A. I couldn't say from memory. They bid in parts of our territory, including some kind of a churn, I couldn't tell you from memory what it was.

O. Do you know how long that churn stayed in the market?

A. I don't remember the kind that they specified. I know in their contract that they met us in competition, and included some kind of a combined churn and butter worker in their specifications.

Q. You spoke of Mr. Benedict, who was he?

A. He was a patent lawer from Milwaukee.

Q. You mentioned also Mr. John Sawyer, who was he?

A. He was general manager for a branch of A. H. Barber & Co., which included creamery supply outfits and machines.

Q. He had charge of the selling of creamery and dairy supplies?

A. Yes, sir.

Q. For a branch known as the A. H. Barber Manufacturing Co.?

A. Yes, sir.

Q. Speaking of the Mower & Harwood concern, are they still in business, or are they out of business?

A. They have gone out of the business.

Q. Do you know the reason why they went out of business?

Mr. Cohen. That is objected to as immaterial?

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. They couldn't get the goods that they wanted to handle. That is the reason Mr. Harwood gave me. That is as far as I know.

Mr. Cohen. I move to strike out the answer of the witness as not responsive to the question, and because he didn't show any knowledge on the subject, but the statement of the witness was a volunteered one.

The Court grants the motion, as far as it covers the answer as to the reason why Mower and Harwood went out of business.

Q. Do you know when they went out of business?

A. Some three or four years ago.

Q. You spoke about something being discussed at some meeting by persons who went into this contract, that they would shelve the patents, except the patents under which the Victor churn and the Disbrow churn were to be manufactured, where was that conversation, Mr. Frink?

A. In the office of Mr. A. H. Barber, or else in the Briggs house, I think it was in A. H. Barber's office.

Q. What was the subject of the conversation, or the substance of the conversation if you can remember?

Mr. Cohen. That is objected to as repetition:

O. Give us the substance of that conversation.

The Court. You have been all over that.

Q. What did you mean in giving your answer whatever it was, by "All the patents," what did you mean by "All the patents"?

Mr. Cohen. That is objected to because I did not read the next question.

The Court overrules the objection and counsel for defendant ex-

Q. What did you mean by the expression, "all the patents"? What did you mean by those words in the answer you gave with regard to putting on the shelf all the patents except the Victor patent and the Disbrow patent?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendant excepts to the raling.

A. I meant that the patents which were then controlled or would be controlled, or that they could get hold of, or had in their hands at that time, or would have in the future. They said they had some patents that were in course of construction by Mr. Penn and Mr. Brown, and they named some others that were developing, that they would shelve, meaning that they would leave the Disbrow as it was, and the Victor as it was at that time. Those who considered by those present to be the two best ones and they would shelve all the rest of them.

Re-cross examination by Mr. Cohen.

Q. When you spoke about shelving, you meant that those patents were not to be used, is that right?

A. Not to be used or sold. There is no difference between using and selling, they were not to be used.

Q. If these people made that arrangements between them, they would go on and sell the Victor and the Disbrow churns.

A. Yes, sir.

O. And they were not going to manufacture the others?

A. Yes, sir.

Q. Was that their idea?

A. Yes, sir, that was their idea at that time.

Q. And that was all the talk?

A. You, sir, but Mr. Busher didn't want it that way.

Q. Mr. Basher thought he had a good patent, or the company thought he had a good patent, but the Wizard man didn't think it was a very good patent? A. He was not present.

Q. You said the Wizard man made no objection? A. Yes, sir.

O. The idea being that Barber thought he had a patent of another churn, and he thought that it would be advantageous to make his churn too, is that right? A. Yes, sir.

Q. Did Barber say at that time that his churn should be substi-

tuted for the Disbrow or the Victor?

A. No, he thought there should be three of them on the market, to make more competition.

Q. To make more competition? A. More apparent competition.

Q. Mr. Barber wanted really more apparent competition than the others did? A. Yes, sir.

Q. They only wanted apparent competition between two, but he was in favor of apparent competition between three, and he wanted three.

A. I am telling what Mr. Barber told me afterwards.

Q. The idea was that electing this agreement made they would put on the market the Victor and the Dishrow? A. Yes. sir.

Q. And the Barber churn would not be put on?

A. Yes, sir, according to the agreement,

O. Did they make that agreement at that time when you were there?

A. I don't think it was signed by themselves, there was a committee it was agreed to and finally adopted.

Q. Who adopted it at that time?

A. I don't know. It went into force.

Q. You don't know anything about it, except at that meeting itwas under discussion, and all those who were there agreed that such a contract was to be entered into, and that they would manufacture the Victor churn and the Disbrow churn but not the Barber churn, is that right? A. It was agreed to.

Q. That is all you know about it?

A. I know it was followed out.

You know that the Barber churn was not manufactured?

A. I think they were all finished up that were on the floor at that time.

Q. All you know is they didn't manufacture the Barber churn afterwards? A. No, sir, not afterwards.

Mr. Leach. Barber presented his argument, and thought that his churn ought to be on the market?

Witness. Yes, sir.

Mr. Leach. Mr. Cohen, will you admit that during all the year

1804, and ever since that time and until the time of his death, Mr. T. J. Howe was a director of the Owatonna Manufacturing Company, and also was general manager?

Mr. Cohen. Whatever the fact is, without your proving it.

## FRANK LA BARE,

Is now called as a witness for the plaintiffs and each of them, under the statute of Minnesota relating to adverse witnesses.

Q. You are the president of the Owatonna Manufacturing

Company, are you? A. Yes, sir.

Q. You have been president how long? A. Since June, 1898.

Q. Ever since June 1898, have you been a director of the Owatonna Manufacturing Company? A. Yes, sir.

O. That is June 1st, 1898, not 1908? A. 1898.

Q. What office have you held with that company during the last four or five years? A. No other office with a title to it.

Q. How long a time was Mr. T. J. Howe a director in the

Owatonna Manufacturing Company, and when?

A. From the time of its organization, I think, in about 1888, until the time of his death.

Q. When did he die?

A. In November, 1908, I think it was November.

Q. November last year?

A. Yes, sir, if my memory serves me right, it was.

Q. Did he also hold the position of general manager of the Owatonna Manufacturing Company, during the last four or five years of his life? A. Yes, he had that title.

Q. Did he have any other office in that company during the

last four or five years of his life? A. He was treasurer.

Q. Anything else besides that? A. No, I believe not.

Q. Was he a very large stockholder in that corporation?

MR. COHEN: That is objected to as immaterial and irrele-

THE COURT: How is that material?

MR. LEACH: I don't think it is, your Honor.

THE COURT: The object will be sustained.

Q. How long had he been treasurer?

A. Ever since the organization of the company.

CROSS EXAMINATION.

vant.

- Q. Mr. Howe died some time after this suit was begun, did he not? A. This suit?
- Q. Well, I will put it this way, you are sure, are you not, that Mr Howe died in the year 1908?
- A. I am under the impression that it was November, 2908, a year ago.
- Q. You say that Mr. Howe had the title of general manager, did he perform the duties of general manager?
  - A. Why, a year ago he did.
- Q. Speaking of the last three or four years of his life, did he during those years? A. No, he did not.
  - Q. Who did perform the duties of general manager?
  - A. No one in particular.
    - Q. By whom was the business managed and run?
  - A. By his son H. C. Howe, W. A. Dynes, and myself.
  - Q. Dynes also had an office in the company? A. Yes, sir.
  - Q. What office was that? A. Vice president.
- Q. Did I understand you to say that you were president from June 1898? A. Yes, sir.

## CORD KING,

a witness produced and sworn on the part of the plaintiff, testifies as follows:

## Examination in Chief by MR. LEACH:

- Q. You live at Owatonna? A. Yes, sir.
- Q. How long have you lived there?
- A. I have lived in Steele county fifty-three years, since 1856.
- Q. Did you know Mr. T. J. Howe in his life time?
- A. Yes, sir, I was quite intimately acquainted with him.
- Q. Did you have a talk with Mr. T. J. Howe about those two lawsuits that the Owatonna Manufacturing Company had against Mr. Virtue after these two suits were commenced?
  - A. I wouldn't be positive as to the date, but I did talk with him.
  - Q. You did have a talk with him about it?
  - A., Yes, sir, we had that talk.
  - Q. Was that after these two suits had been started?
- A. It is my impression that it was, but I wouldn't say positively; but it must have been, or else I wouldn't have known anything about it.
  - Q. In that talk was the subject of these two suits brought up?

    MR. COHEN: Answer yes, or no.

A. Ven air.

Q. What did you say to Mr. Howe about these two suits, and what did be say to you?

MR SPERRY: We object to that, because the swidence already distances that Mr. Howe is dead, and also because any otatement made by Mr. Howe with regard to these matters would not be finished upon the responsion. It was shown he was a director and promptly a manager, by the sit would manager, and in the line of that dory is cannot be a part of its duty, at least is has not been though to be his duty to commence lawsuits or to make any statements with regard to the conduct of them. Of course this witness does not by whether it was before or after the commencement of a cuit, and anything that was said by him, in order to be hinding then the corporation, the Owatomas Manufacturing Company would have to come as I read the law and understand it, from the directors and action of the board of directors, and not from any attraction made by some officer. I think that is the rule, said for that reason I object to any evidence as to statements that might have been made by Mr. Howe.

MR COMEN: I also wish to add to the objection made by Mr. Sperry, that we object to any testimony here in answer to this question calling for a conversation with Mr. Howe, who is now decased on the ground that the record shows that Mr. Howe is dead and on the further ground that is an attempt to prove by an agent a declaration as to a past transaction, which declaration is not and cannot be within his power as an agent of the comparation.

MR COFIEN: Va. also the series. I also object to this crideport on behalf of the Creamery Package Manufacturing Company

of on the further ground that Mr.
blows could under no circumstances bind the Creamery Package
Manufacturing Company

MR LEAGH We have an allegation of a general conspiracy on the part of these book; we allege that they are all is this continuous or computer. We think there is no distinction between the declaration and those that have been give a heretoform. We propose to show what the object of these two lawsuits against the transport of the tr

THE COURT I will sustain the objection as to both defend

mts.

MR. LEACH: Is that on the ground that no foundation has seen laid, or on the ground that it is not admissible?

THE COURT: I do not think that it is admissible as against is Creamery Packages Manufacturing Company. There is no evidence at all to show any connection of Mr. Howe, with the suit, Continue to the lower discussed by On the Menube turing Company.

MR LEACH. The Court understands that he visit a director at Chine there is obtain were remainded.

THE COURTE FOR THOSE WERE LEGAL

ATTEXABLE YEAR HEALT

Here the counter for plaintiffs states to the court that they offered to prove by the witness on the warms stand, Mr. Cord King, that at the time mentioned by said with the stand witness, asked said T. J. Howe how he expected to cont with the still cases against these plaintiffs, and that the T. J. Howe then and there replied to said witness in nabataness as form, "It don't make any difference how we came out; when we get through with Mr. Virtue he will not have money enough left to build a charm."

To this offer the defendants counsel objected as immater irrelevant, which objection was sustained by the court, and the count for plaintiffs duly excepted to the soling.

# SALE DE LE CONTROL DE LA CONTR

s witness produced and sworn on the part of the plaintiffs testifies so follows:

# HEREST THE STATE OF THE STATE O

- O. Where to yet live?
- Lillydale, Dakota County, Minnesota. How long have you been living there? A. Four years.
- What were you doing in the year 1896? Traveling salesman for F. B. Pargo & Co.
- From what place? A. Salat Paul.
  From whom did you receive your instructions prior to Feb-1808? A. C. E. Frink was manager of the house.
- From when did you receive your man actions site that
  - Well, along about July I think J. L. Crump rook hold as

manager.

Q. You received them from Mr. Frink until the time that Mr. Crump took charge? A. Yes, sir.

Q. How long did you receive these instructions from Mr.

Frink?

- A. I don't know when the change took place, he was in the office autil September.
- Q. Then how long after September did you receive instructions from Mr. Crump? A. Until I quit.

Q. When was that? A. About the first of November, 1880.

Q. Was Mr. Crump then general manager in Saint Paul?

A. Yes, air, from 1898 until 1899, as long as I was there, November 1899.

Q. Do you know how long Mr. Crump remained there as manager in Saint Paul? A. I think he is still there.

Q. Who was manager in Minneapolis of the Creamery Package Manniacturing Company's business? A. At that time?

Q. Yes. A. It was Mr. Higgs first in 1898.

Q. How long did he remain there? A. Not very long, and then Mr. Cooper took charge of it.

Q. Mr. C. E. Cooper? A. Yes, sir.

Q. How long was he there, do you remember?

A. Well, I don't remember. He was there until after I got through. I don't know when Mr. Higgs was there, I don't know.

Q. Who is there now as manager in Minneapolis?

A. I don't know.

Q. What was your business while you were in the employ of F. B. Fargo before February, 1898? A. Traveling salesman.

Q. Through what territory? A. Minnesota, Dakota and Northwest Wisconsin.

Q. Any in lowa?

A: Very seldom: I went over the line once or twice.

Q. Both Dakotas, North and South Dakota? A. Yes, sir.

Q. What did you sell for the Fargo Company? A. Creamery outfits and supplies.

Q. Did you know of this combination or contract being made about the time it was made, the contract bearing date February 24, 1898? A. I heard of it.

Q. How soon after that date did you hear of it?

A. The first part of March, 1898, I heard that there was such a combination.

Q From whom did you receive that information?

A. I think from Mr. Frink.

O In Skint Paul? A. Yes sir.

Q. Directly after that time you can tell what raise there was in the price of those things that you were selling for Fargo?

MR. COHEN: That is objected to as immaterial and irrelevant.

THE COURT Overrules the objection and counsel for defendant excepts to the ruling.

A. There was a list of specialties which they called their specialties put in the catalogue price or list price to sell from; the balance of the goods were listed by a general rise all through, I don't know just how much it was.

Q. Can you give any idea of how great the raise in price was?

A. No, sir.

Q. Did you continue in the same business as traveling salesman for the concern known as F. B. Fargo & Co., after that date?

A. Yes, until the first of November, 1899.

Q. How soon did this raise in prices in the stuff that you sold come after February 24, 1898?

MR. COHEN: Was that in writing?

A. I got some of my rise in prices and changes there orally, and part of it was in writing. I think I got a general revision of the prices along in March, 1898, and a new price list, and that I corrected right along. I had my price book and catalogue.

Q. Can you say how great an increase there was directly after that date, in the selling prices of the goods that you sold in your

territory? A. As compared with what they were before-

MR. COHEN: The question is whether you can tell. WITNESS: No, sir, it is too long, I don't remember.

Q. Did that raise in price cover all the articles that you sold, or only part of them? A. Part of them; I think they were not all changed.

Q. What part did it cover?

A. Well, I remember combined churns, and some milk weighers and heaters, and I think separators were given to sell at list, no discount on those. The rest of it I don't remember just how much the rises were.

Q. Was that what is known as specialties?

A. Specialties, yes, sir.

Q. Previous to that date there had been a discount on special-

A. Yes, sir, there was a discount from the catalogue list price.

Q. How was that discount before February, 1898?

A. All owing to how strong competition was.

Q. Can you give us some limit within which that discount generally ranged?

A. Well, on a chure about 25 per cent I think from list.

Q. That is, a combined churn and butterworker? A. Yes.

Q. Are there any other articles on which you can tell as to the discount on those specialties?

A. The same on heaters, and the same on milk weighers.

Q. Can you give us any other specialties?

A. I don't remember what they were, it is so long ago.

Q. You say that after that date you allowed no discount on those goods, is that correct?

A. That was the instruction. That was correct.

Q. Did that raise in prices, or the elimination of discount, did it come gradually after February, 1898, or did it come at once?

A. On specialties it came all at once.

Q. How about the other articles?

A. Butter tubs, that came weekly, and butter color I think. I think changes would be made, I would get a price list about once a week, changes would be made, different things would be changed.

Q. For how long a time did that continue?

A. My recollection is it was changing about as long as I stayed with them.

Q. Where did they commence changing, were the changes, down, or were they all upward?

A. The tendency was upward.

Q. Can you tell us any price at which you sold the Disbrow church, can you give us the price list, or the list price at which you sold the Disbrow churn?

A. I think I sold the Disbrow, I mean the Disbrow churn, round about \$150; \$140 to \$150 was the prevailing price for No. 5, and No. 6, I think.

Q. That was before 1898? A. Before 1898.

Q. The discount was how much?

A. That was the selling price; I think the list price was \$180 or \$200, something like that.

Q. You say the list price remained the same after that.

A. Yes, sir. Our catalogue or list price was the same.

Q. But there was no discount allowed?

A. No, sir, no discount allowed.

Q. You say they allowed a discount uniformly before 1898; they would always allow a discount before 1898? A. Why, sure.

Q. You say you received instructions to raise the price on the other articles shout every week? A. A cliange in price.

Q. A change in price?

A. I changed the prices, I would put in the changes in price, I would correct my catalogue and selling book secondingly. Sometimes I corrected them orally, but if I was gone out I would get a letter about case a week, or once or twice in five weeks. I don't just remember how often.

Q. What was the class of goods that you sold that changes

would be made weekly on?

A. On boilers and piping and fittings, pipe tools, and cream vats and so forth.

Q. Can you tell us about how much these prices on any of these articles that were not specialties were raised, while you were with the company, after February 24, 1898. A. I can't tell.

Q. Were the prices on any of the articles lowered after Febru-

ary, 1898, made lower than they were before that date?

A. I don't remember of any being lowered.

Q. Did you receive all your instructions from Mr. Frink up to the time he left there?

A. Yes, sir, as long as he was manager.

Q. During that time did you frequently bid on complete creamery outfits? A. Yes, sir, do you mean—

Q. I mean did you hid on complete creamery outfits?

A. Yes, sir.

Q. In that territory that you were traveling in? A. Yes, sir.

Q. On those occasions did you meet other traveling men?

A. Yes, sir.

Q. Where from, traveling from where?

A. I met the Cornish, Curtis & Greene Mig. Co.'s man from Saint Paul for a while, the Greamery Package Manufacturing Company's man from Minneapolis, and A. H. Barber's man I think once in a while. Then Haney & Campbell's man of Dubuque.

Q. When you met any of these traveling men who were from any of those concerns which went into this contract after 1898, after February, 1898, and you were all onto the same job, how did you determine what the bid should be?

MR. COHEN: That is objected to as immaterial, and irrelevant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. Well, we would toss up or draw cuts, and decide among

ourselves.

Q. Whom do you mean by yourselves?

A. The traveling men on the ground; who should put in the low bid, and who should put in the high one.

O: Where did you traveling men meet for that purpose before

ng, in your bids?

Any place we wished to be, we used to get together somewhere. The bids were always out in to the creamery directors. One man would put his bid in and have a talk with them, and then the other would put in his bid. But we would make a bid before we would eny of us decide after we got the list. We would sil talk our own goods and try to get our own goods listed if we could. We made a strong talk c.1 our own goods. Then we would decide, if we were all in the combine who was to be the low man.

Q. If there were three of you from houses in the combine

would you do the same thing? A. In the combine, yes.

Q. That is the way you did it?

A. Yes, sir, if they were outside of the combine we would all get our own list put in there if possible. We were given instrucohs to get the business if there was outside competition.

O. If there were outsiders on the bids and you had your spec-

faities how was it?

They were put in at list price; as to the other goods, we

were told to get the business

Q. Take it in a case where you had a complete creamery outfit to put in, and you put in your specialty, such as the Victor churn or the Disbrow churn, what effect did that have upon the outsiders?

MR. COHEN: That is objected to as immaterial and irrelevant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. It had the effect of a handicap.

MR. COHEN: I move to strike out the answer of the witness as not responsive to the question.

THE COURT: The motion will be denied

Counsel for defendants excepts to the ruling.

Q. What do you mean by handicap?
A. In the territory I was selling in the Disbrow churn and the Victor churn and the De Laval separator seemed to be the articles that were wanted by the creamery man in that territory, and we as salesmen knew these things and we also took them into consideragreat deal harder to place it in the creamery.

10. If a churn of this kind was in the list that was put in and

temanded by the creamery company, did that cut off outsiders from

MR. COHEN: That is objected to as immaterial and irrele-

vant, and also as leading.

THE COURT: The objection is sustained on the ground that it is leading.

Q. Will you explain a little better what you mean by handicap.

A. I don't think I quite understand that question.

MR COHEN: He has already explained what he means by handicap.

WITNESS: That the salesman who didn't have a Disbrow churn or a Victor churn or a De Laval separator in the territory L was traveling in. If he had anything outside of them, it seemed that the trade wanted that class of goods, and we were all against any other make. So if there was one salesman trying to sell a Simplex, and three men bucking it, he would have harder work to talk his goods in than the three men talking other goods.

Q. If the creamery company demanded a Victor churn and wouldn't take any other, and you were there bidding on the job, and some outside competitor was there also bidding on the job, what was the effect when it was found out that the Creamery Com-

pany wouldn't take any other churn than a Victor churn?

MR. COHEN: That is objected to as immaterial and irrelevant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling:

A. This other salesman would bid on his churn. He could get a Victor churn by arrangement, but he would rather sell his own churn.

Q. But if the creamery company insisted upon having a Victor

A. He would have to get it of an outsider, if he was not selling the Victor churn.

Q. What would become of the bid of the outsider who didn't have a Victor churn?

A. The man would try and turn him to his own churn. If he didn't have the Victor churn he would tell him he could get a Victor churn, so he could bid on the job.

Q. Was there any way an outsider could get a Victor churn?

A. Not outside of the combination.

Q. I am talking outside of the combination.

A. They couldn't bid on it, they couldn't get it.

Q. So he wouldn't be able to bid on the job?

A. No, sir, only on their own goods. He wouldn't uid on the Victor, because he couldn't get it.

Q. Could anybody outside of those in this combination, after February 24, 1898, could any retailer, any person engaged in putting in creamery outfits, could they get a Victor churn or a Disbrow churn?

A. Not to my knowledge, they couldn't. It had to come through the combination. One of the salesmen of the combination

had to sell them.

2. You know the E. W. Ward concern in Saint Paul?

A. I was one of the organizers of it.

Q. What time was it organized? A. In February, 1903.

Q. Was it a partnership or a corporation? A. A corporation.

Q. What position did you hold in that corporation?

A. Treasurer. .

Q. How long were you with that corporation?

A. From February, 1903, until January, 1904.

Q. Then you sold out your stock?
A. I sold my interest to E. W. Ward.

Q. Did Mr. Ward continue the business? A. Yes, sir, Mr. Ward continued the business until October or November, 1905.

Q. During that time was E. W. Ward doing business in your

building in Saint Paul? A. Yes, sir.

O. What kind of a business did E. W. Ward do?

A. Well, he started in manufacturing butter tubs, and selling general creamery supplies.

Q. How long did you continue the manufacture of butter tubs?

A. Up to about August, 1903.

Q. Did you then quit? A. Yes, sir.

Q. Why did you quit manufacturing butter tubs?

MR. COHEN: I object to any testimony as to the reason why they quit making butter tubs, as immaterial and irrelevant, and outside any of the issues in this case.

THE COURT overrules the objection and counsel for defendant excepts to the ruling.

A. We couldn't get any stock.

Q. What do you mean by stock? A. To manufacture staves.

Q. You couldn't get the material?

A. No, sir, we couldn't get the material.

Q. Do you know why you couldn't get it?

MR. COHEN: Answer yes or no.

A. I don't know.

Q. Did you try to get any material? A. Yes, sir.

Q. Where did you try?

MR. COHEN: That is objected to as immaterial and irrele-

vant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. Of the dealers who sold it.

Q. Can you give their names?

A. I can't remember the names now,

Q. So you quit manufacturing butter tubs? A. Yes, air.

Q. Now, about the prices of butter tube at that time, were there any changes?

MR. COHEN: That is objected to as immaterial and irrelevant, this being in 1903 or 1904.

THE COURT overrules the objection and counsel for defendants except to the ruling.

A. I think they were selling at that time at 24 or 25 cents a piece.

Q. What had been the price before that?

MR. COHEN: That is objected to as immaterial and irrelevant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. I have sold them as low as 16 or 18 cents by the car load.

Q. What other line of business was E. W. Ward doing or engaged in while he was in Saint Paul.

A. Creamery supplies, furnishing supplies that are used in a

creamery and outfits in a small way.

Q. Who bought out the business of E. W. Ward?

A. The Creamery Package Manufacturing Company.

Q. Do you know that? A. Yes, sir. Q. About when did they buy it out?

A. October or November, 1905.

Q. After that time did you lease your building?

A. I had a lease with E. W. Ward, and it was taken care of by the Creamery Package Manufacturing Company. It ran until January 1st, 1909, it started January 1st, 1904, and ran until January 1st, 1909.

Q. Who paid you the rent on that building after November,

1905?

A. The Creamery Package Manufacturing Company. Some of the time I know I got some checks with the Creamery Package Manufacturing Company's name on them and I think some with E. W. Ward. I am not just sure about that.

Q. Under what name did the Creamery Package Manufacturing Company run E. W. Ward's concern after they bought it out?

A. E. W. Ward Company, just the same.

Q. For how long a time? A. Up to August 31, 1906.

Then what became of that place of business?

A. The goods were transferred to Minneapolis and I don't know anything more about E. W. Ward & Co. They transferred my lease August 31, 1906, to J. H. Heinze Pickle Company, and I accepted the transfer.

Q. Was that during the time that the Creamery Package Manufacturing Company was running E. W. Ward's house under that name, that Mr. Cooper was manager of that company at Minneapolis? A. Yes, sir.

Q. He was the man who had charge of the E. W. Ward concern?

A. Yes, sir, I think he was secretary of the E. W. Ward concern.

Q. Did you have any talk with Mr. Cooper as to the purchase by the Creamery Package Manufacturing Company of the business and property of the E. W. Ward Co.? A. Yes, sir.

Q. What was that talk, Mr. Holman?

MR. COHEN: I object to any conversation between Mr. Cooper and this witness, as immaterial.

THE COURT sustains the objection.

A certain paper is marked Plaintiff's Exhibit 1-P.

Q. I show you now a paper marked 1-P, and ask you if that is a letter of instructions which you received from Mr. Frink after Pebruary, 1808.

A. I received these instructions. I know they were in my

handa.

Q. Were these the instructions which you followed in your business after February, 1898? A. Yes, sir.

Q. You received them in due course of mail, did you?

A. My memory is that I got them by mail.

You got them by mail? A. Yes, sir.

O. Those are the instructions that you followed in doing your business for the F. B. Fargo concern after February, 1898?

MR. LEACH: I will offer in evidence Exhibit 1-P.

MR. COHEN: That is objected to as immaterial and irrelevant.

THE COURT overrules the objection and counsel for defendants except to the ruling.

MR. LEACH reads to the jury certain portions of Exhibit t-P, relating to confidential instructions to traveling men, which are as follows:

Counsel reads paragraphs 1, 2, 3, 4, 5, 11, 13, 14 and 15 down to the word "criticism."

#### CONFIDENTIAL INSTRUCTIONS TO TRAVELING MEN.

- 1. The prices given in our price sheet must not be varied or cut a cent in any instance except as noted in section 2.
- 2. When in competition with outside houses on outfits, figure regular prices on all our specialties, then figure other goods down as low as cost, if necessary, but in such cases consult other men identified with our specialties, if they are present.
- In preliminary talks try and get as many of our specialties included in list as possible.
  - 4 Our specialties are as follows:
    Apha De Laval Separators,
    Disbrow, Victor and Wizard Combined Churns,
    Ideal, Curtis and Fargo Skim Milk Weighers,
    Ideal, Larkey and Curtis Milk Heaters,
    Ideal, Fargo and Curtis Turbine Milk Testers,
    Lusted and American Butter Printers,
    Ideal or New Style Rotary Pumps,
    Potts Pastuerizers.
- 5. When you see an opportunity to get business entirely outside of the Creamery trade, for instance Cans, or Pipe or fittings, to Hardware men. Steel Tanks to Dealers, etc., you may make prices to meet the open market, but never on anything which we control, as we prefer to sell these items direct to the Creameries and will not sell under any circumstances to local Dealers or new houses starting up in the Creamery Surply Business.
- 6. In selling Creamery Supplies, you will stick to our net published price list, unless the lists or recent invoices of some of our competitors shall be shown you as lower, in which case you are at liberty to meet such prices.

#### TERMS.

7. Outfits: Must be sold, where possible, for cash within 30 days from date of shipment or (by agreement of salesman on the ground) from date Creamery is ready to start. Where longer time

336 Line

is given, it must not exceed 6 months nor be more liberal than 1-3 cash and balance in five equal monthly payments. Settlement to be made in thirty days from shipment and deferred payments to be covered by notes drawing 8 per cent and secured by chattel mortgage clause in contract or real estate mortgage. No cash discount to be given on outfits under any circumstances.

- 8. Separators: Terms 60 days net from date of shipment or 3 per cent discount for cash strictly within 10 days from date of shipment. In extreme cases terms can be made same as on outfits. In Separator contests only can date time to commence after 30 days trial.
- 9. Apparatus: (Less than outfits) Terms 60 days net from date of shipment or 2 per cent discount for cash within 10 days from date of shipment.
- 10. Tubs and Supplies: Terms 30 days net from date of shipment or 1 per cent discount for cash within 10 days. Special terms can be made on full car lots.
- II. Setting Up: No outfits or machinery can be set up free. In all cases a charge of \$3.00 per day and all expenses shall be made, except where separators are set up to be run in competition with other makes no charge shall be made for setting. A fixed amount shall not be agreed on as cost of setting. Contracts shall all read as provided herein: Amount of compensation to be determined by time and expenses incurred.
- 12. Freights: All goods must be sold F. O. B. St. Paul, Minneapolis or Mankato. No delivered prices given except that delivered prices can be made on car loads of Salt, Tubs, Egg Cases and Fillers.
- 13. Defining Outfits: An outfit is understood to mean a list of machinery furnished to a new Creamery and on such sales cash discounts shall not be given. Apparatus or Separators is understood to mean a list of goods less than a complete outfit furnished to a Creamery already in existence and in such cases discounts can be given as stated above. Where other goods are sold with a Separator the Sep. or a Combined Churn, 3 per cent cash discount shall apply to Separators or churns only and contract shall plainly so state.
- 14. Figuring Discounts. The amount of each discount shall not be deducted from the price in making sale or contract. The full amount without discount shall be stated in order or contract as the amount to be paid. The terms and discount, if any, shall be stated

on the order as a separate item, it being understood that a cash discount shall not be allowed unless cash is paid within the time specified.

- 15. In outfit deals, should two men representing our specialties meet on the ground, they shall figure the list together and, if different figures are obtained, average the result; then draw cuts. The one drawing first choice shall bid the amount obtained as above, the other shall quote one per cent higher. Neither party shall vary or change his bid in any particular without consultation and permission from the other. Each man shall talk his own goods and try to get the business, but no underhanded work, cuts or variations shall be indulged in.
- 16. THESE INSTRUCTIONS MUST BE STRICTLY ADHERED TO AND ANY QUOTATIONS, CONTRACTS OR ORDERS NOT IN ACCORDANCE WITH THEM, WILL NOT BE ACCEPTED BY THE HOUSE AND WILL SUBJECT SALESMEN TO SEVERE CRITICISM.

#### SEPARATOR ALLOWANCES.

The following allowances will be made for second hand separators when taken in trade in part payment for Alphas. These allowances must not be exceeded in any case, and where second hand Separators are so taken in trade, contracts must provide that cash discount shall apply on amount paid in cash only. Don't forget this.

	0.00
Alpha Acme Belt and Turbine Separators	325:00
Alpha No. 1 Belt	225.00
Alpha No. 1 Turbine, old style	125.00
Alpha No. 1 Turbine new style	225.00
	225.00
De Laval Standard Belt	15.00
De Laval Standard Turbine	15.00
De Laval Square or round base Turbine	00.00
15 De Laval Danish Weston Bowl Separator	10.00
25 De Laval Danish Weston Bowl Separator	10.00
Reid Overflow D. W. old style, low bowl	10.00
Reid Overflow D. W. old style, high bowl	25.00
Barber Overflow Danish Weston	25.00
Jumbo	10.00
Sharpless Standard Belt	15.00
Sharpless 1892 Russian, old style Standard Bowl, similar to	
standard	00.00

Sharpless 1892 Bottom Milk Delivery	00.00
Sharpless 1894 to '97 Imperial Russian, new style 2,000 lbs	35.00
	10.00
Sharpless Imperial Belts	25.00
United States '97 to '98	35.00
United States Extractor Style '92 to '96	00.00
One second hand machine only to be taken in exchange for	r one

Another certain paper is marked Plaintiff's Exhibit 2P.

I show you Exhibit 2-P, and ask you if that is also a letter of instructions which you received from your house after February, 1808? A. I think it is.

Q. Did you follow out and operate under those instructions in the conduct of your business after February, 1898, as a traveling man for F. B. Fargo & Company? A. Yes, sir.

MR. LEACH: I offer in evidence Exhibit 2-P.

MR. COHEN: You say this was received by you after February 24, 1898?

WITNESS: I think it was; I have not read it clear through.

MR. COHEN: You think it was?

WITNESS: I can tell by looking at the last end of it.

MR. COHEN: We object to the introduction of Exhibit 2-P as immaterial and irrelevant, being a list of instructions of the same kind; witness says he thinks it was received after February 24, 1898.

THE COURT: I will admit it.

Counsel for defendant excepts to the ruling.

MR. LEACH reads Exhibit 2-P to the jury.

## CROSS EXAMINATION.

## By MR COHEN:

Q. Do you know anything at all about the increase in the price of wages after the beginning of the year 1898? A. No, sir.

Q. Do you know anything at all about the increase in the price at any time, I mean after 1808, of raw material such as went into creamery supplies, I mean? A. I did.

Q. You did?

A. Yes, sir, from 1893 when I was in the business I had occa-

Q. At that time the price generally of all the raw material and of all labor was going up, was it not?

A. In our line which was only in butter tubs, we found raw

material had advanced.

Q. You didn't have occasion to use iron?

A. No, I had no occasion to use iron.

Q. Now, before March 1898, you say there was a discount on specialties? A. Yes, sir.

O. What was the discount on specialties?

A. Two per cent discount in ten days, and three per cent on separators, that is my recollection.

Q. This paper Plaintiff's Exhibit 2-P you think that came to you after February, 1808?

A. No, sir, I do not know since reading it.

Q. You do not know since reading it? No, I do not.

Q. That came to you before the agreement of February, 1898, was made? A. Yes, sir.

MR. COHEN: I think I shall move to strike this out, because it was a transaction before February, 1898.

MR. LEACH: I thought it came afterwards. Then we will withdraw it.

WITNESS: I think it came in before the agreement was made.

MR. COHEN: Then I will ask to have it withdrawn from the jury.

THE COURT: Gentlemen of the jury, you will not take into consideration this paper Exhibit P-2 at all. The witness was mistaken as to the time he received it; and it has been withdrawn.

Q. You say there was an increase in the price of these other specialties; were you not informed at the time of this increase in price, or at the time these increases in price were made, that they were made on account of an increase in the price of the cost of the raw material.

A. Well I don't remember that. I was getting my price list, that's all.

Q. You got some of the increases in prices through letters, and these letters told you from time to time, did they not, that the increase was made because of the increase of the cost in the raw material?

A. I don't remember just the contents of the letters. They might have been that way that owing to the increase in the cost of the raw material the goods were advanced. It might have been worded that way, I don't remember the contents of the letters.

MR. COHEN: Have you those letters, Mr. Leach?

Q. I will call your attention to a letter dated April 10, 1899, from Fargo & Co., to you, and I will ask you to read that letter, and also letter of April 27, 1899, following it; also a letter dated

May 6, 1899, following it, and ask you whether you can recognize those as letters you received. (Showing paper book in case of State of Minnesota v. Creamery Package Manufacturing Company and the Owatomna Manufacturing Company, to witness.)

A. I suppose I can, but I don't remember it.

MR COHEN: I will now offer in evidence from this book, the following letters: Holman "A", Holman "B", Holman "C", Holman "H", Holman "I", Holman "J", Holman "K", Holman "I", Holman "P", and Holman "R", as the letters referred to by Mr. Holman in his examination.

The same are received without objection.

Mr. Cohen, reads to the jury portions of said letters as follows:

#### EXHIBIT HOLMAN A.

St. Paul, Minn., April 10th, '99.

Travelling Men:

Owing to the large advance in the cost of a number of goods manufactured of iron, steel and brass, we are obliged to advance the prices on quite a number of articles. We give you below a list of these articles to which we have annexed the old price and the new price. Please take your discount sheet and change the prices in the same to correspond with the prices (new) given below. Some of the articles given below you may not find on your discount sheet but you can insert them. Quite a number of these articles are listed in our net price list. Of course you will want to bear this in mind and consider that our net price list is wrong wherever it conflicts with the prices given below.

(List of prices here.)

Yours very truly, F. B. FARGO & COMPANY.

#### EXHIBIT HOLMAN B.

J. L. CRUMP, General Manager.

F. B. FARGO & COMPANY.

Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue, St. Paul, Minn., April 27, '99.

F. J. Holman, clo Dix House, Mitchell, S. D. Dear Sir:

We find that the price of boilers have advanced over \$60.00 and we will have to advance the selling price of goods very materially as we have sold about all that I contracted for and we cannot replace boilers today for the money that you are selling at.

(List of prices here)

Please stick to these prices as these are on a very close market at the present time. We dare not charge much more than what they would cost us as people with a large stock will be under-hidding us and we want business so have made the prices as close as we possibly could. It will probably be hard work to sell them at these figures but I do not care to touch an order at any less than what I quote you here.

Yours very truly, F. B. FARGO & COMPANY, Per J. L. Crump.

#### HOLMAN EXHIBIT C.

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

> Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue, St. Paul, Minn., May 6th. '00.

Mr. F. J. Holman,

Dear Sir:

Owing to the advance in price on engines, we are compelled to make an advance from the price that you are now selling by. From this date on the following sizes will be sold as follows:

(List of prices here)

Please make these changes at once.

Yours very truly, F. B. FARGO & COMPANY, Per.

#### EXHIBIT HOLMAN H.

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

> Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue,

St. Paul, Minn., May 18th, '99.

F. J. Holman, Mitchell, S. D.

Dear Sir!

Owing to the advance of boilers, we are compelled to raise the price on Upright Boilers. The price on the Dutton Boiler which is not a submerge flue boiler, is as follows:

# (List of prices here)

The above prices are figured as per the specifications in your price sheet, complete with castings, fittings, and injector but do not include stack. There will also be an advance in smoke stacks and will notify in a few days, if you have to sell any, I would advise you to advance it about 10 to 15c per foot over what you have now.

Yours very truly, F. B. FARGO & COMPANY, Per J. L. Crump.

Submerged flue cost a great deal more.

### EXHIBIT HOLMAN 16.

F. J. Holman,

Dear Sir:

may 19 1899

We have just received a letter from the manager of the Aurora Butter Tub Co., and he tells us that he has just returned from a trip through all of the Stave Factories throughout the country and he says that there are not 20 cars of dry staves in the United States, and will not be for some time. He says that Southern Mills expect to get nothing less than \$0,00 for their staves and some of them are talking of even a higher price than this, and if they have to pay that price for staves, tubs will be advanced several cents, so we do not want you to sell tubs over 100 at a time and where they want carloads, we are unable to figure with them. Do not solicit any new trade but try to take care of our old customers. We are having very hard work to get tube of any kind and the situation is getting more serious so I do not care to take on any new trade as I wish to take care of parties that have stood by us. We will be compelled to advance the price of tubs as the tub factories advance on us but tell the customers that we will give them as close a price as we possibly can and will try and take care of them, although we may not be able to give them what is considered a number one tub as they cannot be had. Please follow these instructions and notify the trade as you come to them.

Yours very truly,

## F. B. FARGO & COMPANY, Per.

#### EXHIBIT HOLMAN I.

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue,

St. Paul, Minn., May 2and, '90.

F. J. Holman, Garden City, S. D.

Dear Sir:

You will remember the last instructions that I wrote you I said that we would probably raise smoke stacks to cts. over the last raise. We have already raised the tocts, so that you can figure that much higher when you are selling smoke stacks and this will barely let us out at the price they cost us. I will quote you on 16" size the No. 16 iron would be 74 and the No. 14 iron would be 88. You see that if you add to cts, to the price that you now have, it makes that, if not, let me know and I will quote you straight on all of it.

Yours very truly, F. B. FARGO & COMPANY, Per J. L. Crump.

## EXHIBIT HOLMAN J.

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

> Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue,

St. Paul, Minn., May 24th, '99.

F. J. Holman, Mitchell, S. D. care of Dix House.

Dear Sir:

Owing to the advance in the cost of tin of all kinds and especially can stock, we are obliged to advance the selling prices of milk cans. Hereafter please make no sales of milk cans at less than the following prices for Iowa or Debuque pattern:

(List of prices here)

These are bottom prices from which no discount can be given,

it makes no difference how large the quantity.

Please acknowledge receipt of this letter and see that your sales conform to the above.

Nours very truly, F. B. FARGO & COMPANY, Per J. L. Crump.

## EXHIBIT HOLMAN K.

L. CRUMP, General Manager,
 F. B. FARGO & COMPANY,

Jobbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue,

St. Paul, Minn., June 2nd, '99.

F. J. Holman, Mitchell, S. D. care of Dix House.

Dear Siz:

We are compelled to advance the price of tubs another cent and they will be sold from now on until further notice, for a3 cts. F. O. E. St. Pant.

F. B. FARGO & COMPANY,
Per J. L. Crump.

## **EXHIBIT HOLMAN 12.**

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

> Jobbers of Creamery and Duiry Supplies, 33-34 East Fairfield Avenue,

St. Paul, Minn., June 7th, '99.

F. J. Holman, Oldham, S. D.

Dear Sir:

Owing to the recent advance in price of all goods, we are compelled to change the discount on the following goods: All talves will be sold from this date on at 45 per cent off; pipe at 45 per cent off; fittings at 50 per cent off.

Please answer that you have received this.

Yours very truly, F. B. FARGO & COMPANY,

Per.

#### EXHIBIT HOLMAN 14

J. L. CRUMP, General Manager, F. B. FARGO & COMPANY,

> Johbers of Creamery and Dairy Supplies, 32-34 East Fairfield Avenue;

St. Paul, Minn., June 9th, '99.

P. J. Holman, Mitchell, Dix House.

Dear Sir:

We wrote you the other day to make a change in your prices and please make the following changes and notify me as soon as you receive it. Pipe from this date on at 40 per cent off, Jenkins valves at 40 per cent off. The prices of all kinds of material is steadily advancing and we are getting low on stock and have to buy and we are buying in small quantities as we have been expecting a change, so you will have to keep in touch and follow these instructions as these are at a very close figure at what we are buying and we cannot afford to sell these goods for any less than what we have quoted you, so please be very careful in selling and look up your quotations.

Yours very truly, F. B. FARGO & COMPANY, Per J. L. Cremp.

# EXHIBIT HOLMAN P.

To the travelling men:

Owing to the advance on price on cans, we are compelled to advance the price on cans, as follows:

(List of prices here)

Please follow these instructions until further orders. Please do not sell below this price.

Yours very truly, F. B. FARGO & COMPANY, Per.

### EXHIBIT HOLMAN R.

Important notice.

Owing to the shortage of tub stock material the tub factories are advancing the price of tubs, this compels us to do the same. From and after June 1st, the price on 60 pound tubs will be 23 cents F. O. B. St. Paul, Minn.

This price is subject to change without notice.

#### F. B. FARGO & COMPANY.

St. Paul, Minn.

Q. You told us something about a handicap that befell a man who was in competition. Did I understand you correctly to say this: That if a man came to a creamery company that was about to put in a creamery outfit, or to any intending buyer, that if the intending buyer insisted upon having a Disbrow churn or a Victor churn, he couldn't get it from anyone else except the owner of those patents; is that right, that that was his handicap?

A. Yes, sir.

Q. And that it was a part of his commercial diplomacy to get a man to accept a churn that he could put in? A. Yes, sir.

Q. And if he could get him to accept that churn he could probably get him to order an outfit?

A. If he could change him over,

Q. If he could change him over? A. Yes, sir.

On the other hand, if the man thought, as most people in Minnesota did, that a Disbrow or a Victor was the proper churn to have, then if they should insist upon having a Victor or a Disbrow, the man who didn't have those machines to sell, and couldn't sell him that particular churn and butter worker, wouldn't be likely to get the order?

A. He wouldn't get the order.

Q. He wouldn't get the order? A. Yes, sir.

Q. Because the whole outfit went together? A. Yes, sir.

Q. That was also so before the contract was made, before the 'agreement of February 24, 1898, was made?

A. No, sir, not entirely so...

O. Not entirely? A. No, sir.

Q. Of course if a man before that agreement of February 24, 1808 was made insisted upon having a Disbrow churn, or insisted upon having a Victor churn, or if he insisted upon having a style "A" churn, he would be out of the running, and every man who couldn't furnish that particular kind of a churn would be out of the running, wouldn't be?

A. No, sir. Before that time, you mean?

Yes. A. No, sir, we would sell any kind of a churn.

You would sell any kind of a churn?

A. Yes, sir, to get an order.

Q Could you before February 24, 1898, go into competition rich a Disbrow man and take an order away from a Disbrow man with a Disbrow churn?

A. Well, I never found any such contingency. We would take an order for a Disbrow churn and fill it, or style "A" churn, after we got the order.

Q. That is different. So that was the only handicap that you

had at that time, that you changed it over? A. Yes sir.

- Q. But in that case, before the agreement of Februar, 24, 1898 was made, where a man said "I must have a Victor," or "I must have a style A", and man who came in with any other machine could get that style A over you?
  - A. There was a way round it, yes, sir.

Q. There was a way? A. Yes, sir.

Q. Without changing the order? A. Yes, sir.

Q. You could make some deal with the other man by which you could get his machine put in there? A. Yes, sir.

Q. That is, you could divide up the order with him, and your company give him some part of the order? A. Yes, sir.

Q. And if you got a man who insisted upon having a Disbrow churn, and you had a style A churn, and he insisted upon the Disbrow you would be compelled to give up the order to the Disbrow man, or make some arrangements with the Disbrow man, by which you would get some profit out of the deal, is that right?

A. Yes, sir, that is partly right,

Q. A man who came into Minnesota and attempted to sell a Simplex, we will say, when he got the specifications of what was to go into the outfit and found that the specifications called for a Disbrow or a Victor churn, he was in the same handicap before as after, was he not? A. After?

Q. His handicap was the same before February 24, 1898, as it was afterwards?

A. I wouldn't say that as far as the Victor was concerned. I mean style A, I think that could be bought. I think you could get that before that date, before February 24, 1898, if they insisted upon it. I think I have seen a United States separator, and possibly seen a style A churn bought in that way.

Q. But those are isolated cases?

A. Yes, sir, they got them in in some way, I don't know how.

Q. But except where an outsider who had not the churn that was specified but had another churn, except that he might in some way get the churn that was specified, or change the specifications or get them changed, there was the same handicap before February 24, 1898, as there was afterwards, because these were patented articles, these churns, and the patentees and licensees could sell them or not as they chose, isn't that right?

A. Yes, sir, partly it was but I was more anxious to sell them,

I was glad to self them any way.

Q. You were somewhat gladder to sell them? A. Yes, sir.

The only difference between the time before the egreement the time after the agreement was that there was some arrange-y, by which an outsider or the outside man could get these man before the agreement, and after the agreement be couldn't them, is that right?

A. Yes, sir, ever since the Cornish, Curtis & Greene Mig. Co., I had a creamery man come into our place and buy two Alpha separators, and I think ten came. They were shipped to Ellaworth, we shipped them to Ellaworth; we knew where they were going and what he was doing with them.

Q. That is, they had to get them on a round about way?

Yes, sir. But in that round about way he couldn't get them after February 24, 1808. We were under contract not to sell the Alpha separator, but we could sell a churn to the Cornish, Curtis & Greene Mig. Co., because we owned that ourselves. Our contract was so we couldn't sell an Alpha separator to the Cornish Curtis & Greene Mig. Co.

Q. But you knowing that contract, and all about it, evaded it, and you sold an Alpha separator to a creamery man, and he furnished it to the other man? A. Yes, sir.

O. Now, there was considerable business that did not inefinde a complete outfit, was there not, and that didn't have anything to do with these complete outfits?

A. The supply business I didn't have so much to do with. I was selling outlits.

Q. You sought out places where new creameries were going in, and new buildings were being put up, and you went into the complete outsit business?

A. Yes, sir, the complete outfit business more than anything

C. Your experience was more in that line?

A. We would sell an individual churn to a creamery occasionally, but there was not so much of that, because the churn was a new thing, and it was not replaced very often. When it was put in there it would stay for a time. They had not been in use very

These charms you say had not been in use very long, so

to there were no new ones put in at that time.
No, sir, only in new catelies at that time.
There were a good many things that went into a com-site that a man could large suveners, were there not?
There was, see it was not practical only to buy those,

it was note practical to buy them all sogether from one house.

Q. Why was it not practical to buy them argumens else?

A. On account of getting them shipped and the local freight.

That would handicap a man in buying an outfit. He would want to buy it all together and have it shipped all together, and in reaching the different houses there would be a good deal of trouble

Q. So that there was some economy in buying from one man, or buying a complete outfit from one concern?

A. Yes, he could get it all in one car if he got it in one bunch, by dealing with one man.

Q. So he would save something on freight? A. Yes, sir.

Q. But a man who wanted to fit out a creamery could have bought a large proportion of these articles from others besides creamery supply men, and from others besides churn men?

A. Yes, but he would have to go and get a lot of piping and such stuff and boiler and engine and everything of that kind.

Q. Piping and fittings and boiler and engine?

A. Yes, sir, and one thing and another that there is round a creamery.

Q. And then he would have to get some of his articles after all from a creamery supply house, would he not?

A. Yes, sir, from a creamery supply house.

Q. That is he would have to get these patented articles that are known as specialties from them? A. Yes, sir.

Q. Such things as these putentees and licensees have got?

A. Yes, sir.

Q. If he bought a complete outfit? A. Yes, sir.

Q. But you buy your whole outfit from me and you save money, because you will have less freight to pay. If you buy your whole outfit from me you save money, because I am skilled in the business of setting these thing up, and I know how to do it, I know how to go at it, and I can do it well, is that right?

A: Yes, air, sure.

Q. Is that your argument?

Yes, sir, but I didn't always believe it.

Q. You were a salesman, and you were looking for results, were you not? A. Yes, sir.

Q. But that is the real argument that you made, that that was the economical way for a man to fit out his place?

A. Yes, sir.

Q. That is right, isn't it? A. Yes, air.

O. Now as regards these prices that you obtained and the changes in prices, it was usual, was it not, before this agreemen

of February 24, 1895, was made, as well as afterwards, to send you out changes of price from time to time?

A. I didn't change my price list from one end of the year to

another.

Q. Didn't you get catalogues from time to time from your bouse?

A. I don't remember of it. I would come in the first of the year and fix up my price list and go ahead.

Q. Did you not get price lists and changes in them from time to time?

A. No, sir, I don't remember that.

Q. Do you mean to say that you ran along two or three or four years on one price list?

A. Yes, sir. I didn't need even a price list, I knew all the

Pices.

Q. Were there any changes made?

A. I don't remember of any now in the creamery supplies, but in some things such as piping and boilers and fittings and such things as that there might have been some little changes sometimes; I don't remember now any material changes though.

Q. The list price of the patented articles remained the same?

A. It was the same discount, we had no change on that.

Q. No change on that? A. No, sir.

Q. Either before or after?

A. After we had a change on that.

Q. You had a change on the discounts? A. Yes, sir.

Q. But the list was the same?

A. The catalogue was the same, they were all catalogued.

## RE-DIRECT EXAMINATION.

## By MR. LEACH.

Q. Before February 24, 1898, did you sell a Disbrow churn wherever you could find a purchaser? A. Yes, sir.

Q. Whether it was to a creamery, or a retail dealer or a wholesale dealer, or a hardware dealer? A. Yes, sir,

Q. Wherever you could sell them?

A. Yes, sir, wherever I could sell a churn.

Q. After February 24, 1898, did you sell any of these Disbrow churus to any retail dealer? A. No, sir.

Q. Or to any wholesale dealer? A. No, air.

Q. You sold only to a creamery? A. I sold only to the trade.

Q. Was that in accordance with the instructions that you re-

Or From the general office? A. Yes, sir.

#### RE-CROSS EXAMINATION.

### By MR. COHEN.

- Q. Could you tell us how many individual factories you sold to just before the Rebruary 24, 1898 agreement? A. No. sir. Q. Do you remember as many as five or six? A. Individual?
- Yes. A. Yes, sir, but I don't remember just how many I did sell.
- Were individual sales frequent or rare? A. I don't remember.
- Q. The fact is your business was with complete outfits when you got the chance? A. I sold individual churus also.
  - O. But you can't say how man?
  - No. sir, I can't say how many.
  - You never sold to any jobbers, did you? A. Yes, sir.
  - Q. Before 1898, or after? A. Before 1808.
  - Q. After you did not? A. After I did not.
- Q. Do you know whether the Creamery Package Manufacturing Company sold its specialties to jobbers after that time?
  - A. I do not know.
  - O. If they did they did not sell them through you?
- A. I did not sell any of ours for F. B. Fargo & Co., after the 24th of February, 1898. I did not sell any to jobbers.
  - Q. But you did before that? A. Yes, sir, I did before that.
- Q. And if they were sold to jobbers they were sold by persons other than you? A. Yes, sir.

### RE-DIRECT EXAMINATION.

# By MR. LEACH.

- Q. In these letters which Mr. Cohen has read to you concerning these prices of articles, were any of these articles specialties, or were they all articles which were not specialties?
- A. These letters, I don't think there are any specialties in those letters.
  - Q. And the raise in the price of specialties came when?
  - A. In the first instructions we got.
  - Q. What month was that?
  - A. I think it was, I think along in March.
  - Q. 1898? A. March, 1898.

# ROBERT CRICKMORE,

A witness produced and sworn on the part of the plaintiff. testifies as follows:

#### EXAMENATION IN CHIEF

#### By MR. LEACH.

Q. Where do you live? A. Owatonna Township.

Q. How long have you lived there? A. About as years.

Q. Do you hold any position on the State Board?

A. Not at the present time.

Q. Have you ever held any? A. I have.

Q. When was that? A. For the last 7 or 8 years.

Q. What position did you have?

A I was secretary of the Dairymans Association, four years, four years vice president and president for one year.

Q. When did your last term of office expire?

Last January.

Q. Have you been on any Creamery Boards in that neighborhood in the purchase of creamery supplies? A. I have.

Q. And churns? A. Yes, sir.

Q. Very many times? A. Yes, sir.

Q. Covering what period? A. About 8 years.

Q. Beginning when and ending when?

- A. The last 6 years ended a year ago last March, and it was about 4 years prior to that time when the 2 years was, beginning with that.
  - Q. So the six years ended last March?

A. A year ago last March.

March 1908? A. March 1907, no March 1909.

Q. What position did you hold the last time? A. I was secretary and manager of the Creamery association at Pratt.

Q. Where was that? A. Pratt, Minnesota.

Q. In Steele County? A. Yes, sir.

Q. During that time did you buy any creamery supplies?

A. I bought a churn of the Creamery Package Mig. Co., and our supplies we bought of different firms.

Q. Did you have during that period any purchasers at what we call competitive bids? A. Yes, sir.

Q. How many? A. Two different times.

Q. When were those? A. I think one was in 1903, and the other was in March, 1904

Q. What did you buy at those times?

MR. COHEN: I object to that as immaterial and irrelevant. The Court overrules the objection and counsel for defendants epte the reling.

A: We bought a churn and refrigerator and a cream vat and

an engine and boiler and a milk weigher.

- Q. All at the same time? A. Yes, air, all at the same time.
- Q. Anything else at that one time?
- A. We bought practically a full outfit from them, with the exception of separators if I recollect right.
  - Q. When was that purchase you made?
  - A. That was in March, 1904, March 17th I think.
- Q. What firms had traveling men on the road and at that place bidding on the supplies?

MR. COHEN: That is objected to as immaterial and irrelevant.

The Court overrules the objection.

- A. The Creamery Package Mig. Co., Cornish & Greene Co., Mower & Harwood, Mr. Adair, The Creamery Supply Co., of Owatonna, and Fairbanks, Morse & Co., I think had a man there also.
  - Q. Were there any others?
- A. Not that I recollect just now. Mr. Virtue was there with Mr. Adair.
  - Q. Who was there representing the Creamery Package Co.?
  - A. Mr. Rice.
  - Q. Who is Mr. Rice?
- A. I think he was the manager of the Creamery Package Co. of Minneapolis.
- Q. Did the board meet and consider the churn which they would buy? A. They did.
- Q. Did they make up their minds before they made the purchase? A. They did.
  - Q. What churn did they agree upon?

MR. COHEN: That is objected to as immaterial and irrelevant.

Court overrules the objection and counsel for defendants excepts to the ruling.

- A. The Virtue Churn.
- Q. That is the churn made by Mr. Virtue or the Owatonna. Fanning Mill Co., at Owatonna? A. Yes, sir.
- Q. After the board had agreed upon the buying of the churb from Mr. Virtue did you have any talk with Mr. Rice who was there representing the Creamery Package Co.? A. We did.
  - Q. What conversation did you have with Mr. Rice then?

MR COHEN: I object to this as immaterial and irrelevant, and because any statement made by Mr. Rice to this witness

would not bind the Creamery Package Co.

THE COURT: He was there representing the Creamery Package Co.

The objection is overruled.

Counsel for defendant excepts to the ruling.

A. In our talk with Mr. Rice we proposed to buy several things from him, and asked him to submit prices without the churn. He told us we were taking chances if we bought Mr. Virtue's churn and we did not buy it.

Q. In what way did he say you were taking chances in buy-

ing Mr. Virtue's churn?

MR. COHEN: That is objected to as leading.

THE COURT: I think he has answered your question.

Q. Will you please give his language, Mr. Crickmore, that he used to you what he said to you? A. I could not give it to you.

Q. Give us the substance of it?

MR. COHEN: That is objected to.

A. The inference was that Mr. Virtue's churn was an infringement.

MR. COHEN: I object to this statement.
THE COURT: The objection is sustained.

MR. COHEN: I wish to strike out that last statement of the witness.

THE COURT: The motion is granted.

THE COURT: State what he said, if you can? WITNESS: I have practically stated what he said.

Q. Will you please give it again, all of it, if the court will permit?

THE COURT He has already stated it.

Q. You have given it all have you?

A. That we would get into trouble if we took that churn.

Q. What did you understand by what Mr. Rice told you and from what he said?

MR. COHEN: That is objected to as immaterial, incompetent and irrelevant.

The Court sustains the objection.

Q. After you had that talk with Mr. Rice, whatever it was, and you have given us the talk, what was done by your board the way of changing from the Virtue churn to any other churn,

if you did so?

MR. COHEN: That is objected to as immaterial and irrelevant.

The Court overruled the objection and the counsel for defendant excepts to the ruling.

A. On account of that, we bought the Disbrow churn.

Q. On account of what? A. Of the threats of Mr. Rice.

MR. COH ...: I move to strike out the word "threats".

THE COURT: The motion is granted.

Q. Did you change from the Virtue churn to the Creamery Package Company's churn on account of what Mr. Rice told you?

MR. COHEN: That is objected to as immaterial and irrelevant.

The court overrules the objection and counsel for defendant excepts to the ruling.

A. We did.

Q. Did you then buy the Disbrow churn? A. We did.

Q. Whom did you buy it through or from?

A. Through the Creamery Package Mfg. Co.

Q. Through Mr. Rice? A. Through Mr. Rice, yes.

Q. Do you remember the price you paid for it?

A. I do not now.

Q. Did you say that you at another time were buying a churn before that, or complete outfit?

A. We bought one before, I think about a year before that.

Q. What creamery was that for? A. That was for a Pratt creamery also.

Q. The same creamery? A. No, sir, we had two creameries there.

Q. That was a complete outfit? A. Yes, sir.

C. Can you give the date about when you bought that outfit?

A. No I don't think I can, it was about a year prior.

Q. What is that? A. About a year prior to the other.

Q. Who were the bidders trying to put in that outfit?

A. Mr. Stone was there for the Creamery Package Co., I don't remember whether anyone else was there or not at the time.

Q. At any time while you were on the board, as you have testified, did you have given to you competitive bids apparently, in which representatives were there for the Package Creamery Co., putting in one bid and some representative also for the F. B. Fargo Co.?

A. No, F. B. Fargo Co., was not there.

Q. Or the Cornish, Curtis & Greene Co ? A. No, Mr.

O. Or the E. W. Ward Co.?

A. We got competitive bids of Ward and Fargo and the Creamery Package Co., on an engine.

Q. When was that?

A. I think that was the March before, or the March afterwards, I don't remember which.

Q. March, 1905? A. It was either March, 1905, or March

Was that on an engine that went into the creamery?

A Yes, sir.

Q. Did saything else go in there with it? A. No.

Q. Who was there making these bids?

A. We went to the different houses and got them there in Minneapolis.

Q. Which houses did you go to?

A. We went to the Creamery Package Co., in Minneapolis and Fargo in St. Paul and Ward in St. Paul.

Q. Whom did you see at the Ward place?

MR COHEN: That is objected to as immaterial and irrelevant. The court overrules the objection and counsel for defendants excepts to the ruling.

A. This manager, I forget what his name was.

Q. Where did you go to first? Which house did you go to?

A. I think we went to Ward's first.

Q. You don't remember his name?

A. No, I know him, but I don't recollect his name.

Q. Have you ever seen him since? A. Yes, sit.

Q. What is he doing now? A. I don't know what he is doing.

Q. Did you get a price from Ward? A. We did.

Q. Then where did you go?

A. I think we went to Fargo, and then went to Fairbanks, Morse & Co.

Q. Did you get a price from him?

A. Yes, sir, and then went to Fairbanks, Morse & Co., and then went to Mr. Rice of the Creamery Package Co.

Q. How did the price given you by Mr. Rice compare with the price given you by the Fargo house of St. Paul?

MR. COHEN: That is objected to as immaterial and irrelevant. The court overrules the objection and counsel for defendants excepts to the ruling:

A. They were different engines.

Q. They were different engine. A. Yes, sir.

Q. Did you then know, Mr. Crickmore, that the two houses were run under or were owned by the same concern?

MR COHEN: That is objected to as immaterial and irrelevant. The court overrules the objection and counsel for defendants excepts to the ruling.

A. We did not.

Q. Did you think that you were going to competitive houses when you went to this house of the Creamery Package Co., of Minneapolis and the Fargo house at St. Paul?

MR. COHEN: That is objected to as immaterial and irrelevant. The cour. overrules the objection and counsel for defendants excepts to the ruling.

A. We did.

Q. Have you attended a good many meetings of this State Dairy Association? A. Yes, sir.

Q. They are attended by people of every State?

A. Yes, sir, certainly.

Q. At these meetings have you discussed and do you discuss matters of interest to creamery men in those states?

A. To creameries and dealers, certainly.

Q. When did you first find out that Cornish, Curtis & Greene and the Creamery Package Co., and the Fargo Company all belonged to the same head?

MR. COHEN: That is objected to as immaterial and irrelevant. The court sustains the objection.

Q. Did you know what the general understanding among creamery men and dealers was during the past several years as to these houses being competitive or not?

MR. COHEN: That is objected to as immaterial, incompetent and irrelevant.

The court sustains the objection.

Q. Have you been attending the State Fair for the past two years? A. Yes, sir.

Q. And county Fairs as well? A. Yes, sir.

Q. Have you noticed that the Creamery Package Co., and Fargo supply houses have been exhibiting at the State Fair.

MR. COHEN: That is objected to as immaterial, incompetent and irrelevant.

The court overrules the objection and counsel for defendants

scepts to the ruling.

- A. I have.
- 2. Have they had exhibits together, or separately?
- A. Separately.

  O: Under separate names?

MR. COHEN: The same objection.

THE COURT: The same rating.

Counsel for defendants excepts to the ruling.

- A. Under separate names.
- Q. When was the last State Fair that you attended?
- A Latte year.
- O. At these State Fairs did you consult with the people at these different places about the price of the goods? A. No.
  - Q. Never did? A. No, sir.
  - Q. Did you go there and inspect and examine their goods?
  - A. At the State Fair?
  - Yes. A I looked over the exhibit.
- Under what different names were these two places at the State Fair conducted?

MR. COHEN: That is objected to as immaterial and irrelev-

THE COURTS He has already answered.

Q. When you inspected those goods at the State Fair a year ago, or two years ago, in 1907, did you then know that they were under the same management?

MR. COHEN: That is objected to as immaterial and irrelevant. The court sustains the objection.

- Q. Did you notice the churus which these different concerns had and which they were exhibiting? A. I did.
  - Q. What were they?
- A. To the best of my recollection Fargo had a Victor and the Creamery Package Co. a Disbrow.
- Q. Is that true of all the State Fairs that you attended, as far as you can remember? A. It is, to the best of my recollection.

## CROSS EXAMINATION.

## THREE COLLEN

O Mr. Crickmore, in 1904, at the time you got these various oplies in March, did you also have competition from J. G. Cherry

accessive was atthem from Mover & Free works & Free cherry's

would not be positive which.

Q. Did you notice the machines that were exhibited at the State Fair so as to see how those machines were marked, I mean churus and butter machines? A. That I cannot say.

Q. Did you notice whether the Victor churn was marked as manufactured by the Creamery Package Co.?

A. No, sir, I could not say as to that.

Q. You testified on a former case, did you not? A. I did.

Q. Do you remember saying there, speaking of your buying supplies for the creamery at Pratt, that you never had any bids from the two houses of Fargo and the Creamery Package Co., on the same job? A. That was with reference to the sale in 1904.

Q. I think that is correct. You went around in St. Paul and

got these prices? A. Yes.

Q. That was not a competitive bid. A. No.

MR. LEACH: We now offer and read in evidence the deposition of A. J. Cushman, taken at Lansing, Iowa, in May, 1908.

Said deposition is then read by Mr. Williamson as follows:

A. J. Cushman, sworn, testified as follows:

## By MR. LEACH.

Q. Mr. Cushman you live in Lansing, Iowa?

A. My home is in Waterloo, Iowa, but I am staying here most of the time at Lansing.

Q. How far is Waterloo from here?

A. It is about one hundred and eight miles.

Q. You have a place of business here?

A. Yes, sir.

Q. In what business, Mr. Cushman?

A. In manufacturing of egg cases, box factory and saw mill combined.

Q. How long have you been in that business?

A. This is the third year.

. Q. Prior to going into your present business, in what business were you engaged?

A. In the creamery supply business.

Q. About when did you first engage in that business, the first time, Mr. Cushman?

A. It is nearly thirty years ago.

Q. At what place?

A. At Waterloo, Iowa.

Q. How long did you then continue in that business?

A. I think it was twenty-two years.

Q. What became of that business?

A. We sold it out, sold out to the Crossery Pickage Con-

Q: The Creamery Package Manufacturing Company, a corpor-tion of Chicago, Illianis?

A. Yes, sir.

Q. Who was then president of the Creamery Package Manufact. uring Company?

A. I think Mr. Gates was.

O. What were his initials?

A. C. M. Gates, I think that is the name.

According to your best recollection what year and what time of the year was it you sold out to that concern?

A. It was in the spring of the year, I can't remember just what month, as near as I can remember about nine years ago.

O. And that business was then located at Waterloo, Iowa?

Waterloo, lows, at the corner of Fifth and Sycamore

O. How large a place was Waterloo at that time?

About between seven and eight thousand.

Q. At the time you sold out to the Creamery Package Manufacturing Company what was the name of the concern that you were operating at Waterleo and that you sold out?

A. A. J. Cushman Company.

Q. Was that a corporation?

A. A corporation, yes air,

Q. Of what state?

A. Of Iowa.

Q. And its principal place of business was at Waterloo?

A. Ar Waterloo.

Q. State more in detail the nature of the business of A. J. Cushman Company at the time you sold out?

A. We were manufacturing better tube and handling a general line of supplies, a tin shop and a machine shop, in our machine shop we espaired separators, and spare parts of separators.

Q. In the line of supplies, were they such articles as are usual-

ly sold to creameries?

A. Creameries and cheese factories.

Mention some of those articles?

Separators, charms, and milk vats, cream vata, cheese vata, ting, oils, steam fitting goods of all kinds, valves and everyg of that description.

ercicular hind of separator that you handl-

A. The main separator we sold the last few years we run was

called the Alpha, it is now called the Dalawal.

Q. By what concern was the Alpha separator manufactured at e time you sold out?

A. I think it was the DeLavel.

Where was that Company located?

A. I can't think, I think it was in New York some place.

Q. You were the agent for the Aipha Separator for the De-Lavel Company, were you net?

MR. COHEN: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes, we were agent for them.

Q. How long had you been selling the Alpha Separator before you sold out?

A. I think about two years.

Q. Did you have any particular territory?

A. Yes, there was, I couldn't tell just what that territory was ast now.

Q. Did it include all of lowa?

A. I couldn't say positive. I am not just sure about that, I think there was a division in the territory.

Q. Did you at that time sell any churn or butter worker when you sold out?

A. Yes sir.

O. What one?

A. Disbrow churn.

O. That was manufactured at Owatonna, Minnesota?

A. Yes sir.

Q. Did you have a contract with the manufacturers of that charn?

A. I think we did, we had some kind of a contract, I can't remember positively it is so long ago. We had a contract as to some certain territory where we should sell it.

Q. When you sold out to the Creamery Package Manufacturing Company, how was the value of the property you sold to that:

Company determined?

A. Invoicing the stock, the office fixtures and machinery was lumped and the balance of it we invoiced the stock, and the real estate was rented to them I think for five years at \$130,00 a month, and they had an option of purchasing it at \$17,000.00 at any time within three years, that's my recollection of it.

Q. Did they make the purchase of the real property within

those three years?

A. They did.

Q. At that price, \$17,000.00?

A. Yes, sir.

Q. What was the price they paid you for the stock and fixtures?

A: I think it was somewheres in the neighborhood of \$46,000.

Q. Over about how long a time did the negotiations continue between your company and the Creamery Package Manufacturing Company, prior to the time you sold out to that Company?

A. I think there was a contract drawn on that, a contract made giving them privilege of purchasing it, within about two weeks from the time they came there it was closed, and I think it was a week they had to decide in, I think they came in and settled within a week from that time.

MR COHEN: We object to that is immaterial and irrelevant, and because the answer is not responsive to the question, and I therefore move to strike out the answer. The question was about how long a time did the negotiations contine, and the answer is "I think there was a contract drawn on that," and then says "I think it was a week they had to decide in", so the answer is not at all responsive to the question.

THE COURT: I will let it stand.

Counsel for defendants except to the ruling.

Q. Had they tried to buy you out previous to this time?

A. Previous to that four or five years, yes, I guess six or seven years they had been trying to deal with me.

Q. The Creamery Package Manufacturing Company?

A. Yes, sir.

Q. In what way had they been trying to deal with you?

MR. COHEN: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. In the first place I put in tub machinery and they tried to buy that of me and then give me a salary for handling the goods.

Q. Did they ask you to sell them that at that time?

A. Yes.

Q. That is about how long before you finally sold out to them?

A. Six or seven years I think.

Q. Did you make any contract then?

A. Not at that time.

Q. What was the next negotiations you had with them?

MR. COHEN: That is objected to as immaterial and irrelevant.

Objection overraled. Defendants except.

- A. The next was a deal where they wanted me to go into a ertain contract with them to keep up certain prices in a certain territory.
- About how long was that before you sold out to the Cream-0. ery Package Manufacturing Campany?
  - About three years, three or four years.
  - Q. Do you remember who did the talking?
  - A. Mr. Gates.
  - Q. Was he president of the company then?
  - A. Yes, sir.
  - Q. What did Mr. Gates say to you at that time?
  - A. He wanted me to enter into an agreement with him.

    Q. Was that by correspondence or personal talk?

  - A. Personal talk.
  - O. Where was that talk had?
  - A. At a hotel in Sterling, Illinois.
- Q. As near as you can remember what did Mr. Gates say to you at that time?

MR. COHEN: Objected to as immaterial and irrelevant.

THE COURT: When did that take place, how long ago?

MR. COHEN: He says it was about nine years before he hie testimony. It is three years before the deal was made, if it was nine years before the testimony was taken.

Objection overruled. Defendants except.

A. It was simply about my going into an agreement with them as to the price of butter tubs and the territory we should work in.

- Q. Did he tell you what territory he wanted you to work in?
- A. Yes, sir.
- Q. In what way did they violate the contract?
- A. By shipping tubs into my territory.
- O. After you found that out did you respect the contract any further?
  - A. I did not.
  - Q. After that how long was it before you had another con-

About two weeks.

tract or agreement with the Creamery Package Manufacturing Company?

A. We had no other contract with them of any kind until after we sold out, I think it was about three years after that.

Q. About how long were the negotiations pending between you and the Creamery Package Manufacturing Company the last time when you sold out?

A host two weeks I think from the time they came there is no made a deal with them: They had a week's time to make their minds I think after they entered into the contract.

O. Ware those negotiations in writing or by word of month?

. They were in writing

O. Did saybedy from the Creamery Package Manufacturing supany visit you and talk with you in regard to selling out?

A. Mr. Gates and Mr. Rowe. Mr. Rowe had been in business I think and sold out to them about that time. I think it was D. H.

When you say Mr. Gates, you mean the president of the Creamery Package Manufacturing Company?

A. I mean the president of the Creamery Package Macadactur-

ing Company.

O. Did he make a visit to your place of business at Waterioo?

A Yes, sir.

Q. That was about how long before you sold out to the Creamery Package Manufacturing Company?

O. How long did he stay there, Mr. Gates?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. He stayed there all the time, two weeks, he went away and came back again. We entered into a contract to take a certain price and they were to accept that, and I think there was a week they had to make up their mind, I think it was a week. They had to be back there in a week with the money or that sale would have gene through.

MR. COHEN: This relates to the terms of a written instruet. I think I shall have to move to strike out the answer after the first sentence. I move to strike out everything in this last answer after the first paragraph.

The court denies the motion and counsel for delendant excepts to the ruling.

Q. You say Mr. Gates was there for about two weeks.

A Yes

And when he went away at the end of that two weeks did a have a contract with you or an option to purchase?

A. Year

Q. Before Mr. Gates went away did you take an inventory of e property?

A. No, not until after he came back

O. After Mr. Gests was gone about a week did he come back

- A. I think he did, I can't remember. When they were taking the invoice I know Mr. Higgs was there, I am not sure, I can't answer that:
- G. Did you have some talk with Mr. Gates about the object of the Creamery Package Manufacturing Company purchasing out your business?
  - A. I don't think I did.
- Q. Did you have some talk about what other concerns and properties had been purchased by the Creamery Package Manufacturing Company?
  - A. Yes, I had some talk about that.
- Q. What did he say to you as to what other property had been purchased or controlled by the Creamery Package Manufacturing Company?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

- A. I wont be positive whether he had purchased this property then or whether they were going to. It is F. B. Fargo & Company of Laze Mills, Wisconsin, and the Cornish, Curtis & Green Manufacturing Company of Fort Atkinson, Wisconsin, and then I think this man Rowe was with him, he had been in the supply business there.
- Q. What did he say as to whether or not he controlled those concerns you have named?
  - A. I can't remember that.
- Q. Did Mr. Gates say anything to you about you going into that combine?

MR. COHEN: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. When he bought me out he wanted me to take stock in the company.

Q. Did he ask you to take stock in the Company?

A. Yes, he was quite anxious for me to, the deal hung quite a while on that.

Q You mean take stock in the company for part of your pay?

A. Yes, sir.

Q. I suppose you refused to do that?

A. Yes, sir, I refused to do it.

Q. Did Mr. Gates ask you to let the Coamery Package Manufacturing Company run your busices at Waterloo in the same old name after the Creamery Package bought of you?

MR COHEN: That is objected to as immaterial and irrelevant

# Physician over Ned Defendant a create

Yes, sit.
What did Mr. Gates say to you about running the busis at Waterloo in the same name, Mr. Cashman, if anything?

MR COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except

He saked me if he could do that, he wanted to do that:

O Did he say why he wanted to run the business in your

A: I don't remember.

2 What dis you tell him!

A. I told him I certainly would not, when I was out of busiteas I was out-

After this contract was made about nine years ago and acented by the Creamery Package Manufacturing Company, you ty you took as inventory of your stock of goods?

Was that inventory based on the actual value of the propery at that time?

Yes, sir.

Q As near as you could determine?

A. Yes, actual value and cost prices.

Q. And the total price exclusive of the real property as near as you can remember was somewheres in the neighborhood of how much?

About \$46,000,00

And you say the Creamery Package Manufacturing Company paid you \$20,000 eo down?

A. I think they paid \$20,000.00 down, and it was either \$25,poo oo or \$26,000.00 we took their notes for and a mortgage on the property, and they paid half each year,

O. Did the Creamery Package Manufacturing Company pay won the balance of the purchase price within the two years?

A. They paid each year when the notes come due.

O. Then they paid you dollar for dollar?

A. Yes, air, I think they paid us just what it was worth.

O. Afterwards the Creamery Package Manufacturing Company purchased your real property?

A. Yes, sir.

Q. Do you remember what they paid you for that?

517,000,00, there was some little buildings on there, I think er paid me \$7,500 on. There was a little addition to the property as we had the option on it. Q. How extensive a business were you doing and carrying on just prior to the time you sold out to the Creamery Package Manufacturing Company?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. I couldn't tell in dollars and cents the amount of business we done each year.

Q. Perhaps you can tell approximately?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. I don't believe I could come anyways near, the boys kept the books and looked after that part of it, and I managed the thing or looked after we had something coming at the end of the year.

Q. Was it a profitable business?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. It was a very profitable business.

Q. Throughout what territory were you transacting business and making sales just before you sold out to the Creamery Package Manufacturing Company?

A. I don't think we confined ourselves to any particular terri-

tory.

Q. What territory did you cover?

A. We sold in Illinois, Missouri, Wisconsin, Iowa, Minnesota, and we sold stuff in California that I can recollect of.

Q. Did you have traveling men on the road?

A. Yes, sir.

Q. Throughout what territory?

A. Well, we had traveling men in Iowa, and Minnesota, parts of Minnesota, we only had two or three men out, and once in a while we went into Illinois, didn't make it a regular business in Illinois.

Q Just previous to the time you sold out to the Creamery Package Manufacturing Company with what concerns were you in competition?

A. There was Cherry of Cedar Rapids, and there was Mower & Harwood of Cedar Rapids; F. B. Fargo, Lake Mills, Wisconsin; Cormish, Curtis & Green Manufacturing Company of Fort Attituon, Wisconsin and the Creamery Package Manufacturing Company of Chicago, and there was also a branch house at Kansal City, Kimball I think the man's name was that run! 41 that time

Plant olitice did you hold in the A. J. Commiss ton was president and transmiss of the company. Who are the other officers? / M. J. Gushinga was secretary of the company. Wher were the other stock holders? They were We Hackett Bien inicial

A I can't ressember, a sum by the same of Harkett, and Daly, and Andrew Thompson, and Mr. Bakett, I can't remember his two name. W. W. Miller was another man in the company.

O. What became of the corporation A. J. Cushnasa Company, after you sold out to the Greamery Package Manufacturing Com-

It went out of trustress and nothing more was done with it

Did it ever to any more business?

For now long a time did the Creamery Package Manufacaring Company conduct the business at Waterlee that you sold

Philips they are in manners the copies

In the same place?

No, they changed buildings in about three years, I think the building was sold, the butter tub business, such as that they quit manufacturing, but the regular line, the supply business, I

exerted on yet.

Did Mr. Cates say anything to you about what profits you rould be able to make if you went into that combine and took stock

le for your property

MR COHEN. That is objected to. We object to the use of e offensive wird "combine."

Colection described Defendants accept.

can't remember about that, I don't know.

Did Mr. Gette of the Creamery Package Manufacturing

don't think-I can't remember of his ever writing me a

make any threats to you if you did not sell

to medicate in this property year sold

to the Channes Society Manuschille Comment

Q. What kind of patients were those?

A. Patents on a tester, a cream sestor. I thisis there was just

Do you remember the value that was placed on that patent in that sale?

A. I think that was included in the deal, that we surned over all patents we had except cow milker patents. I think it was worded that way in the deal.

Q. Did you ever receive any communication from the Creamery Package Manufacturing Company as to those patents before you sold out?

A. No, not any particular patents, I didn't.

Q. Or any patents?

Well, on butter tub machinery we had, I can't remember now whether we had any communication with him in writing concerning those, when I met him we had a talk

What was the communication?

Just simply that I was infringing on their rights in using the butter tub machinery.

Q. What was your reply to the Creamery Package Manufacturing Company?

A. I did not consider we were.

What did the Creamery Package Manufacturing Company say they would do to you, if anything?

A. I don't think they made any threats of that kind.

Q. But they bought you out?

A. They bought us cut.

Q. How long was that talk before they bought you out, about the patents?

A. That had continued three or four years off and on, concerning output of butter tubs and patents on machinery and that kind.

Q. Can you remember how many traveling men you had on the road just previous to the time you sold out?

A. Three men.

Q. Some of them traveled in Minnesota?

A. Some of them went into Minnesota, we used to do quite a little business in Southern Minnesota

Q. What was the nature of that business in Mionesota, what did you sell there mainly?

A. Creamery supplies, from small articles to large, we used to same complete outfits. We used to sell quite a far of goods in Minnesota, not so many complete outfits as in lows.

#### WILLIAM C. LAWSON.

A witness produced and sworn on the part of the plaintiff, testifier as follows:

#### EXAMINATION IN CHIEF.

### By MR. LEACH.

- Q. Where do you live?
- A. Havana, Steele County, Minnesota.
- Q. What is your business?
- A. Buttermaker.
- Q. How long have you been a buttermaker?
- A. Most all of the time since 1890.
- Q. At that same place?
- A. No, I have only been there a little over three years at that place.
  - Q. Where were you before that?
  - A. I was at Geneva and Ellendale and Clarkville.
- Q. When you were a buttermaker, had you anything to do with the purchase of supplies for the creameries, where you were working?
  - A. Net very much.
- Q You simply attended to receiving the cream and making the butter?
  - A. Yes, sir.
- Q. Did you know a churn manufactured by Mr. Virtue, or the Owatonna Fanning Mill Company, known as the two roll machine with reversible rolls?
  - A. Yes, sir.
  - Q. Have you used that machine?
  - A. I have been using one for a little over two years now.

MR. COHEN: We object to this as immaterial and irrelevant.

THE COURT: What is the object of this?

MR. LEACH: We wish to show the value of the combined churn and buttermaker, how it works, and that it does its work well; and to show that this churn is made in accordance with two letters prient taken out by Mr. Virtue and Mr. Hagedon, as bearing upon the value of those patents.

Mk. COHEN: We shall object to it because it is out of the order of proof. If the objection is overruled I will argue the question of damages.

THE COURT: I think you had better go into the first part of the case before you go into the question of damages

MR LEACH: Then we will not proceed with Mr. Lawson until a little later.

MR REIGARD: Plaintiffs and each one of them now offer and read in evidence the deposition of E. S. Parker, which is admitted by stipulation of parties and was taken in June, 1908 in other litigations with the agreement that it may be read here with the same force and effect as if it were a deposition taken in this case.

#### E. S. PARKER,

called and sworn as a witness on behalf of the plaintiff, was examined in chief by Mr. Leach and testified as follows:

Q1. What are your initials, Mr. Parker?

A. E. S. Parker.

Q2. And what is your business?

A. Why, I am following the painter's trade just now.

Q3. Where do you live?

A. Why, my home is in Minneapolis.

Q4. Were you ever at work for the Creamery Package Manufacturing Company?

A. Yes, sir.

Q5. Between what dates?

A. Why, I started to work the 11th day of March, 1901, and I worked until the 1711 of June, 1907.

Q6. What were you doing during that time?

A. At first I was office boy.

Q7. Whereabouts? In Minneapolis.

Q8. For how long a time?

A. Why, I think for about the first year and a half.

Qo. Then what did you do?

A. I then did the billing-bill clerk.

Q10. For how long about?

A. I think one year; I am not positive about it.

Q11. Then in what position; what did you do?

A. I was down in the shipping room, assistant shipping clerk.

Q12. How long?

A. Well, I was there two different times. First time I was there one summer and then I went back in the office and did the billing again in the winter, then I went down down again in the following summer, if I remember rightly.

Q13. What other work the you do for the Creamery Package Manufacturing Company while you were in their emplay, Mr. Par-

Well, the last time that I was in the shipping room in last moser I worked way up into the winter in the shipping room and then I went over to R. W. Ward's.

Qs4. What was E. W. Warde? A. That was a creamery supply house in St. Paul.

Org. What time did you go over there?

A. I think it was the 9th of January, 1906.

Q16. How long did you remain there?

A. I remained there until early in September. I think it was about the oth or 10th of September that I got through over there in the same year.

Q17. Did you go back then to the Creamery Package office in Minneapolis?

A. I did, yes, sir; not in their office, in the warehouse.

Q18. What did you do while you were over at the E. W. Ward place?

A. Why, I did most of the office work, opened the mail, entered the orders, did the posting in the books and also did the receiving of the butter tubs and the shipping out.

Q19. By whom were you employed while you were at work in

E. W. Ward's at St. Paul?

A. Why, I was under Mr. Cooper's direction.

Q20. Who was Mr. Cooper?

A. Mr. C. P. Cooper was manager of the Creamery Package in Minneapolis at that time.

Q21. Did he order you to go over there, Mr. Parker?

A. Yes, sir, he did.

Q22. What business was E. W. Ward Company doing? A. It was doing creamery supply business.

Q23. Do you know whether it was really a part of the Creamery Package Company's office?

A. It was when I went over there; Quar Was it a part of the Creamery Package Company's office? A. It was.

Q25. Was that business at the E. W. Ward & Company store Paul, while you were there conducted in the name of L. W. or the name of the Creamery Package Manufacturing Com-

The name of E. W. Ward Company.

6. How long did that continue, Mr. Parker?

A. Continued, well until early in September, 1906.

Q27. And then what was done with the E. W. Ward & Com-

pany business?

A. Why, it was transferred I think it was closed up, and the goods shipped to Minnespolis to the Creamery Package Manufacturing Company.

Q28. Do you know what time the Creamery Package Manufac-

turing Company acquired that business of E. W. Ward?

A. I think I do. October, 1905. .

Q29 How do you know they acquired it at that time, Mr. Par-

A. Well, I remember when the deal was made and I know the other man was over there and when he went over there I went and took a hold of it.

Q30. And who was that other man went over there before you went over there?

A. C. M. Quory.

Q31. And Mr. Quory was what you might call the manager there? A. Yes, sir.

Q32. And Mr. Quory was there until you left? A. Yes, sir.

Q33. And what was the character of the goods sold by E. W. Ward Company?

A. Why, it was creamery supplies.

Q34. How long had the E. W. Ward Company been conducting the business in St. Paul?

A. That I could not state. I don't know the exact time.

Q35. How far back do you know that they did do business there?

A. Why, I think they started about 1902 or '03, in St. Paul, I would not swear to it. I could not say accurately.

Q36. Was any inventory of the goods taken when they were bought out by The Creamery Package Manufacturing Company?

A. Yes sir there was.

Q37. Did you assist in that inventory?

A. Not in the first one.

Q38. Was there a subsequent inventory taken?

A. Yes, sir.

Q39. How did it happen that there was two inventories?

A. Why, I don't know, only as to, except they wanted to show how much goods they had on hand, what the value of the goods were.

Q40. Can you give us the amount of the total inventory when you went over there?

A. I could not give the exact amount.

Q41. Can you give it approximately?

Yes, sir.

What was it, approximately?

A. I think somewhere in the neighborhood of fourteen to sixteen thousand dollars, fourteen to sixteen.

Q43. Including any real property?

No. sir.

Q44. Was the E. W. Ward Company in competition with The Creamery Package Manufacturing Company before The Creamery Package Manufacturing Company bought out that concern?

A. They were, yes sir.

O45. Throughout what territory, Mr. Parker?

A. In Minnesota mostly, that I know about.

O46. Did the E. W. Ward & Company have traveling men out on the road?

A. They did.

Q47. How far back can you remember that competition, Mr. Parker?

A. Well, they were in competition before they went to St. Paul with the Creamery Package.

Q48. That is the F. B. Fargo, E. W. Ward were in competition with The Creamery Package Manufacturing Company before E. W. Ward went to St. Paul?

A. Yes, sir.

Q40. Where was E. W. Ward located before they went to St. Paul?

A. Waseca, Minnesota.

Q50. How far back do you know that E. W. Ward & Company were located in Waseca, Minnesota, were in competition with The Creamery Package Manufacturing Company, Mr. Parker?

A. Now, I could not state that. I don't really know. I know

they were there quite a while.

Q51. Do you know the way The Creamery Package House in Minneapolis did business with the F. B. Fargo & Company house in St. Paul during the time you was there?

Yes, sir.

Q52. And what business connections and relations there was between them?

A. Yes sir

Q53. Did you have anything to do during the time you were ere with the sale of goods, Mr. Parker?

A. In a small way, yes air.

Osa. Un until the time you left?

A. Yes, sir.

Q55. What was your custom and practice, if a purchaser should come to the house, to your place of business where you were and he wanted to buy a bill of goods and you gave that purchaser your prices on that bill of goods and the purchaser stated to you that he wasn't satisfied and wanted to go over to the Fargo bouse in St. Paul? Did that ever happen while you were there?

A. It did, yes sir.

Q56. Now, after that proposed purchaser would leave your place of business, what did you do, if anything, in the way of informing the Fargo house in St. Paul as to what had taken place?

MR. COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except:

A. Why, we went to the private telephone, rang up the Fargo Creamery Supply House in St. Paul and told them who the parties were, what the list of goods was and the prices we had quoted them,

Q57. Now, you spoke about a private wire. Was there a private wire between the Creamery Supply House and the Fargo house.

A. There was, yes, sir.

Q58. Was that wire there during all the time you were with them, Mr. Parker?

A. Not all the time, no sir.

Q59. About when was it put in there?

A. I think it was about 1903, I would not say the exact year, It was sometime, after I came there.

Q60. And did the Fargo house treat your house in the same way? When a purchaser went there to the Fargo house and wasn't satisfied with the prices, did the Fargo house ring up your house?

A. Yes, sir.

Q61. Was that done?

A. Yes sir, it was,

Q62. And when that purchaser arrived at your house is Minneapolis and you knew what prices the Fargo house had quoted him, what was your custom in regard to doing business, quoting the same price, higher price or lower price?

MR COHEN: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Quoted him a higher price:

Q63. As a rule, how much higher, Mr. Parker?

A. Why, it depends a good deal on what it was.

Q64. But the price was always higher was it?

A. Yes, sir.

#### TREES ENAMED AND A

Q68—What time was it that you worked over in St. Poul?

From the gels of January, 1906, until about the toth of Sep.

What did yes here to do with the selling of goods

Why, waited on customers when they came in, showed

Ort. You were not a salesman, were you? Well, around the buildings I was. Yes, sir.

74. Made the prices yourself? No. sin. I took them out of the catalogues.

O75. You said you did a little selling. Is that it?
Yes, the customers were not in there all the time, of course; en they did come in I waited on them.

XQ76. How many customers have you waited on in your life?

A. I could not say the smount of them.

XQ77. Have you waited on as many as twenty?

Yes, sir-

XO/8. And during what year did you do that?

A. All the time that I was there.

1079. At the time you were shipping clerk and billing clerk and all that your did all there

A. Led, air.

XOSo. You did do that while you were an office boy, did you?

EOSt. Continued during all the time you were there?

Yes, Sir.

KOS2. How old are you?

XQ83. And you went into the employ of this concern seven 3015 (35)

A. Yes sir 1901

KOSa. And left them a year ago?

Yes en

Constitution of the Williams

XO86. Have you some feeling against them for discharging

None at all?

None at all.

1088 that the you supper to give your testimony here. Mr.

TOTAL THE PROPERTY OF THE PROPERTY OF

knew I was subpossed.

XQ89. How to you know that The Creamery Package Massi-facturing Company bought out the stock of E. W. Ward & Compa-27?

A. Why, I saw the inventory that was taken and I saw the

books. I could not say the exect amount that they were paid.

XQoo. That is all you know about it. You saw the inventory that was taken. The first one or the second one that was taken?

A. I saw both of them.

XOGI. And you saw the book entries of the Creamery Package Company?

A. Yes, ain

XQqa. Did you see any contract?

A. No, I didn't see any contract.

XQQ3. You don't know anything at all about any arrangement that was made between the Creamery Package Company and Ward & Company, do you?

A. Not as to that, no, sir.

XQ04. You inferred from what you saw there that the Creamery Package Company did buy out the merchandise of Ward & Company?

A. Well, I didn't get it all there.

XOos. Where did you get the rest of it?

A.I first heard it when I was working in Minneapolis.

XOCO. Somebody tell you?

A. They did.

XQqy. And then you saw these entries on the books, when you were sent over to St. Paul and worked in Ward's place?

Yes, sir.

XQ08. And that is all you know about it, isn't lt? Anything more

A. Why, I guess that is all, yes sir.

MR. REIGARD: Plaintiff now offers and reads in evidence deposition of J. L. Crump, taken at the same time and place as the preceding deposition and covered by the same stipulation:

J. L. CRUMP.

called and sworn as a witness on behalf of the plaintiff, was examned in chief by Mr. Leach and testified as follows:

Qt. Your name is J. L. Crump?

A Yes sir.

Qa. And you live in St. Paul?

A. Yes sir. Qs. What position do you occupy there?

A. I am manager for the Creamery Package Manufacturing Company branch, known as the Pargo Creamery Supply House.

O4. How long have you been manager there, Mr. Crump?

A. Well since March 1808

MR. LEACH: We will call Mr. Crump as an adverse witness erose-examination.

MR SPERRY: We will object to his being called as an adverse witness on behalf of Mr. La Bare and the Owatonna Manufacturing Company, because the witness is not shown to be an official of that company, and is not a representative of that com-

THE COURT: The questions then will only relate to the Creamery Package Maguiacturing Company.

Q5 March, 1898. Were you there when Mr. Frink was there?

Ves sir.

Q6. Were you manager when he was there?

Yes sir.

O7. What were you doing before that time?

I was-I went with the F. B. Fargo & Company, took charge of their collections.

OR For how long a time?

A. March 1st, 1896.

Qo. You knew of that contract of February 24 > 1898, being made, did you, about the time it was made?

A. About the time it was made, yes sir.

Q10. Did you see it then?

A. No. sir.

Q11. Did you ever see it?

A I saw it some time; I don't know just when.

Q12. And that is about the time you were made manager, was 

A. I was made manager after this deal was consummated.

Q12 Now, this house there in St. Paul goes by the name of

A. Pargo Creamery Supply House.

Qta Pargo Creamery Supply House. And has been using that e for how long

I don't remember when it was changed.

Ore Bolove is used this name, what name did it use?

A. F. B. Farge & Company.

Q16. Can you tell what time that change took place?

A. I think it was about three years after. That would be upor, but I am not positive as to that date. Three years after 1896.

Q17. You received all your instructions and have since March,

1808, from the Creamery Package Manufacturing Company of Chicago, haven't you, Mr. Cramp?

A. Yes sir.

Q18. They come in the way of written correspondence?

A. Yes, sir.

Org. Some of the instructions orally?

A. At the time this deal was made I received some instructions orally.

Q20. And all your instructions as to the traveling men from your place of business are received from Chicago, too, are they?

A. They are.

Q21. And you send out those instructions?

A. Yes, sir.

Q22. And whatever instructions you send out with your traveling men are in accordance with the instructions you receive from Chicago, are they?

A. Well if we have any.

Q23. As you understand, the Fargo Creamery Supply House is owned by the Creamery Package Manufacturing Company?

A. Yes, sir,

Q24. And has been ever since February 24th, 1898?

A Yes, sir.

Q25. And the Creamery Package Manufacturing Company also has a house at Minneapolis, has it?

A. Yes, sir.

O26. Is there a private wire between the Fargo Creamery Supply House at St. Paul and the Creamery Supply house at Minneapo-Tin?

A. Yes, sir.

Q27. Do you know of purchasers of goods coming to your house in St. Paul and getting prices on articles and because they were not satisfied there with those that they would go over to Minneapolis and buy of the Minneapolis house, of The Creamery Package Manufacturing Company?

A. Do you want me to enumerate them?

O28. No, have those things happened, do you know?

A. Yes air.

Oso. After he gives his order would you call up the house and uform them of the prices you have made those men and the lis

dor to the present time that the

And the house is Minnespolls will treats you in the name

And how otten does in eventuring of that load take

How often did it take place four or five years byo? It very often.

Can you give us any idea how often? Well not very often:

Circ to any ites how many times a month?

A Sometimes not he a month

Gel. When was the last time that it took place?

A. I cannot remember now.

B. Well, do you say the other house does the same with you as us do with them is that respect? A. Yes, six.

Gel. When the house in Minneapolis, the Creamery Pankage Janulaciuring Company there, felephoned you that they, that a name had started for your house from Minneapolis and had give not help price and the name of the man and the fiet of the goods and that man arrives at your house in St. Paul what has been your amon as in parting the same prior, a higher price of a lower price?

As It stepends to what the article is

leza. I say you give him a lower price on a whole onlit, do

LIN CONTON Tracts dilicite in an immiliaral and involve Objection overraled Defendants toroget

The second state of the second second

the object of the Minnespelle beans telephosti hungs? A. We have a feet him been dence there the understanding with the Minne po you will quote a higher poice.

pois deal simble oge Whit combines

iow Mr. Cramo

Opp. How long taxe you sold both of th

A. Sold the Distrovesince in

Q40. How long the Vistor? A. Ever since it was manufac-SI S S S SA

O41. Can you tell about the date?

A. I think that was brought out in 1893.

Q42. Where is the Victor chain manufactured?

A. At Lake Mills, Wisconsin.

Q43. By whom? A. Farpo Creamery Supply House.

Q44. And where is the Disbrow manufactured?

A. At Owatonna

Qas. In Owatonna by the Owatonna Manufacturing Company? A. Yes, sir.

Q46. Are those charms now sold on the market at the full list price? Mr. Crurap? A. Yes, sir.

Q47. How long have they been sold on the market at the full list price? A. Since 1898.

Oas Since this contract of February 24th, 1898? Is that right? Yes ein

There is a regular list of prices, isn't there? A. Yes, mir.

Qso. How is that determined and arrived at?

A. Well I don't know how it is determined and arrived at

Que. Where do you get that list price? A. Chicago.

Q52. By mail? A. Yes, sir.
Q53. Has that remained the same since February, 1898? Occasion of decreased? A. It has been increased.
Q54. When did that increase take place.

A. A few years ago; I cannot tell when.

Out About tow much was that increase? A. About trainity

ive per cent, I guess.

Oss. Can you give us the year of that increase? Was it these

You understand that there is no competition now, do between the Victor charin and the Mahrow charm?

Previous to February 20th, 1968, the Victor clines on

the Disbrow chure were in competition. A. Yes, sir.

Q50. And do you know that date? d do you know at about what prices those churns were

number a I believe was sold at—I get mixed upon the

They were sold, weren't they, at a certain per cent, off rices before February 24th, 1898? A. Yee, six. dr. Can you tell us about how the per cent ranged off the dif-

ferent numberal. At about what per cent off the list prices were those churns sold at or before the 24th of March, 1898?

A. to to so per cent.

26s. And you understood of course that there was competibetween those two churns?

A. Material was cheaper at that time and we could give it.

QC3. How many fraveling men are there now out from your

house in St. Paul? A. Two.

Got. Where do they travel?

A. Trave in Central Minnesots and Wisconsin.

Oby. How many traveling men are there out from The Creamery Package Manufacturing Company of Minneapolis? A. Five.

Oby. What territory do they cover?

A. Minnesots, North and South Dukots and Montana.

Oby. Do any of your traveling men cover the same territory as

Qff. What territory in this state? A. Central Minnesota west of St. Paul.

Q69. Do these traveling men who cover the same territory are instructions what to do when they meet on competitive deals?

A. They don't meet.

Q. How long since they have been meeting on competitive deals? A. Some time. Ozo Can you tell how long?

Practically they have not met for four or five years.

O71. Before that time travelling men from those two houses used to cover the same territory somewhat and used to meet in competitive deals, did they, Mr. Crump. A. Yes, sir.

net? A. Yes, sit.

low you heard what Mr. Holman said he was accused to do schen he was traveling from the St. Paul house?

hat he and the other traveling hen would meet and dea wald make the first bid and the next and the other tim a little higher bid and get the job? In that way you heard that? A. Yes air.

Q75. It that the way your traveling men were doing up to within four or five years ago? A. I believe it was.

Orb. Through this territory you have mentioned?

A. Yes, sir.

Q77. Were those your instructions from your house, Mr. Crump?

A. I don't remember that those instructions were. I presume it was

Q78. You instructed your traveling men to do that, Mr. Crump, did you not? From your house?

A. I don't remember the instructions, but I presume it was something like that. It has been so long since we have had those instructions that I have forgotten.

Q79. Then you say for the last four or five years no traveling men from your house meets on any competitive deal from any Minneapolis house?

A. Not supposed to. They might on outfits once in a while, on some vat or something of that sort.

Q80. When they meet in those places do they make bids apparently competitive?

A. No, they simply bid on churns that are our specialties.

Q81. Is there any traveling men in this state now from the Cornish, Curtis & Greene Company? A. No, siv.

Q32. Of from the A. H. Barber Manufacturing Company?

A. You mean the old company?

Q93. Yes, sir. A. No, sir.

Q84. Do you know about what per cent of churns in use now in Minnesota in creameries, whether Victors or Disbros?

A. There is more disbros.

Q85. How many? A. I could not say, but quite a number-more.

Q86. What per cent of all the churns are the Disbro and Victor

A. I don't know what creameries are using; whether the little ones have been torn out or not.

Q87. There is a private wire existing between your house in St. Paul and the Creamery Package Manufacturing House in Minneapolis, is there?

Q88. How long has that been there, Mr. Crump?

A. It has been there several years.

(189) How long did the Cornish, Curtis & Greene Company have a house in Minneapolis? Till about what time in St. Paul, I mean? A. They had one a little over a year, I believe.

Occ. About what time did they discontinue the house in St.

Why, in 1899 or 1900. I wouldn't want to say positively what time they discontinued there.

Qor. What was done with goods and property that were left when that discontinued? A. Shipped to Minneapolis.

Oca To the Creamery Package Manufacturing Company there? A. Yes, sir.

Qoz. Do you know of the Creamery Package Manufacturing Company's house at Minneapolis and also the house St. Paul exhibiting at the state fair in this state as competitive houses?

A. We are not exhibiting as competitive houses.

Our Exhibiting, I say, at the state fair?

A. Not competitive.

Qos. Have you, if you ever exhibit there, do you exhibit them together? A. Separate.

Ogó. Each enters his own name, I suppose? A. Yes, sir.

Ooy. Has that been true at each state fair? A. Yes, sir.

Qos. Has Cornish, Curtis & Greene Company had a booth at the state fair in this state?

A. They have not of late years. Never since their house was discontinued here.

### CROSS EXAMINATION.

By MR COHEN

XQqq. Mr. Crump, you have been asked about customers who first come to you and those who first came to the Minneapolis house, and I understood you to say that on outfits you made some variations and that in those cases you didn't give the same prices.

A. Why, if the list was different it would figure a different Drice.

XQ100. And then on that other list you would be a competitor for that same bid, that same-

A. It would figure out practically the same if they figured the same list

XOIOI. In point of fact are the Minneapolie and St. Paul

KO2002. Is the St. Paul house getting as much business as it Jegitlinately? A. Yes, sir.

And the Minnespolls house the same? A. Yes, sir. Now, the St. Ptul house and the Minnespolls house pushings of various blade with each other, have they, for which one this private deal? A. Yes, six

Cotos is the private in Antipos sold, to the

catching the customer before to tween the two chies?

A. Why, we use the line a good deal because at have a pretty large business and we get out of stock—one of as gets but of stock—we use the others stock and using the public line we want table one in. We had very page service, so we put in the private the continuous line. We had very page service.

to get in. We had very proviserrice, so we put in the private flue at that we could have proper service.

XQtob. Before 1808 you say that there was some discountlay on the prices of churus when they were put in as part of outsits and sometimes when they were sold individually. Is that it, or was it only when they were parts of outfits?

A. I don't know how the boys figured them when they were out on the read

XQ107. That discount, you don't know how that was figured out? A. No.

XQ108. So that you don't know what happened before '98 as to the amount of the discounts? A. No. air.

XQ100. And are you able to say what was the reason for the discount, if there was one? A. To get the business, that is all.

XQ110. To get the business? A. Yes.

XQ111. As to the amount of the discount and the extent of it you don't know, but you do know that there was some discount, do you? A. Yes.

XO112. And you are unable to say whether that discount was on individual machines or whether it was solely on outfits?

A. On individual machines there was usually a discount.

XQ113. What was that amount ten or twenty per cent, or don't you know?

A. Well, as I remember there was something like that, ten us twenty per cent.

XOLLA And that discount on individual machines as well as the discount on machines that went into outfits, was allowed after March, 1898? A. No.

KQ115. That you know, that there was no discount after March, 1808? A. Well, yes, shortly after March, about that time.

XO116. You have been asked what your practice was as to customers that came to you who had already been in the Minu his house. Now as to contomers that come to you and who proposed to go to the Minnespolis home, do you or do you not tell them. about the relationship between the two houses?

A. Yes, sir, have of late years.

XQ117. What so you tell them?

A Tel there that the Creamery Package Company is the same

as the Ferra Creamery Supply House

XQ138. And that the Creamery Package in Minneapolis is the same concern? A. Same concern.

XQ119 As to these exhibits in the state fair, do you know about those yourself? A. Yes, sir.

RQ120. Now, in regard to the goods that are sold in the St.

A. They practically all have tabels on, "Manufactured by the Creamery Package Manufacturing Company."

XQ:31. That is true, is it, of the patented articles, the special-

A. Yes I am speaking of the specialties, of the specialty articles

XQ122. The ordinary commercial articles and staples are without marks.

XO123 But the churns and butterworkers and separators and other patented articles have in general you say marked on them, "Manufactured by the Creamery Package Manufacturing Company."

A. Well, the separators don't but the vats and pasteurizers, churns and such article as we manufacture to: the creamery have labels on.

XQ134. Are you able to say whether in those exhibits at the state fair your goods, exhibited by your house, the Fargo house, were marked in the way you have testified to, marked, "Manufactured by the Greamery Package Manufacturing Company?"

A. They have a fittle brans plate on them. That goes onto ev-

A. They have a little brans plate on them. That goes onto everything and they may have years ago, we had some by the Fargo Creamery Supply House and there might have been one or two on there but practically all of them have the Creamery Package on there.

XQr25. I am speaking now of the goods that were exhibited?

A. Yes, sir. I would say that more than that was, because I didn't look, but off hand I would say they did have.

## RE-DIRECT EXAMINATION.

# Read by MR. REIGARD:

RDQ126. Has it been your custom to tell everybody who saks you about it of late years that the two houses were under the same management. Mr. Crump?

A. Practically. I don't deny it when they salt me.

RDQ157. You don't deny if when they ask you? A. No. RDQ158. Well, what do you tell them when they ask you?

A. Tell them that the Creamery Package own; this branch and it is a branch just the same as the Minneapolis house.

RDQ149. How long have you been doing that, Mr. Crump?

A. Four or five years.

RDQ130. Every customer who asks you in regard to those things? A. I should say so

RDQ131. There has been no attempt to de sive anybody of the fact for four or five years? A. No, air.

RDO132. Or to conceal that fact? A. No, sir.

RDQ133. And yet you say when customers come to your place to buy a bill of goods and go away and say they are going to the Minneapolis house, you telephone over to the Minneapolis house the customers name and the price you made that customer?

A. That is on outfits.

RDQ134. You don't tell that customer you are the same house, do you? A. If it is my deal I practically do so.

RDQ135. You practically do so? A. Yea, sir. RDQ136. He goes off just the same, off to the Minneapolis house, does he? At Sometimes.

RDQ137. It that your instructions to the men in your employ there, when a man comes and asks for prices on goods and he says he isn't satisfied, is going to the Minneapolis house, that the two houses are the same? A. They do do it.

RDQ138. They do it right along, do they? A. Yes, els.

RDOI to. How long has that been true?

A. Been doing it for four or five years. I handle practically all the people who come in there.

RDQ140. Tell that to everybody, Mr. Crump?

A. Practically everybody.

RDQ141. Four or five years ago you didn't? A. No sir.

RDQ142. What made the change in that respect? How did you come to make that change?

A. Practically everybody knows it in the creamery business.

Mr. Reigard: Plaintiffs and each of them now offer in evidence. and read the deposition of D. J. Ames, taken in this case before a properly authorized officer on April 24, 1909.

David J. Ames, being duly sworn, testified as follows:

Qt. Where do you live, Mr. Ames? A. Minneanolla.

Qa. Did you formerly live at Owatonna? A. Yes sir.

On Were you at one time a stockholder and officer in the Own-

the life Company? At Yes in.

O4. Life you hold the office of president I. At. Yes:

The During what period to meat as you can remember (ill yo hold the office of president of that concern?

A. From the day of its organization such the last of June, 1898. Q6. During that same period, what edite the T. J. Howe hold?

A. He was the secretary and breasurer.

Q7. Do you remember of the execution of a contract bearing du
he 10th day of April, 1807, between the Owatonna Mfg. Compar

and the Conservy Package Mig. Company?

At I haven't the dater fixed exactly in my mind, but I think it was about the date placed there that we made a contract with them.

(16. And it or about the same time was there also a contract state between the Disbrow Mig. Company and Reulen B. Disbrow, Levi A. Disbrow, D. W. Payne and H. N. Seely, of the one part, and the Owatonns Mfg. Company of the other part, by which certain patents were assigned or agreed to be assigned to the Owatonna Mfg. Company?

Op. And were those patents subsequently assigned to the Owatouns fig. Company? A: I think they were:

Qso. Was there sho at about the same time a contract made between the Dishrow Mfg. Company and others and the Creamery Package Mfg.

A. I den't call to mind now whether I know or coderstand from

your question what that control is.

Oth. Where was the construct of April 19, 1897, between the Owam Mise Company and the Disbrow Mig. Company executed? I show you a copy of that contract which is attached to the complaint in this case and marked Exhibit B (9).

A. Is was made at Mankato. Q12. Who was present at the time that contract was made?

A. There was Reuben B. Dishrow, L. A. Dishrow, D. W. Payne, H. N. Scelye and Mr. Passens, C. M. Gates, C. H. Hiers, T. J. Howe, H. M. LaBare and myself.

Ots. Was Mr. McBroom there?

A. I con't remember that he was. He may have been there some of the time during the two or three days that this agreement and contract was being talked of and arrived at, but I couldn't say positively.

Q14. Was C. P. Cooper there?

A. I don't remember that he was.

Q15. How long a time did the Owntonna Mfg. Company and the Dishrow Mfg. Company carry on acquitations concerning the making this contract?

A: I think it was all a record at at this meeting of this or the doja, w li tene jant at 152

Ost Work's make a very classical principal and the bridge

One. More one there it Minimals the regulator two or their depart

Har all you come to so the blacking from to estimate on

Mr. Cohen. Some of this answer I will object to, and I small like to have you calculated a name to the court.

Mr. Cohen. We move to strike out that provides of the enswer he givening with the word "and he thought it the object, down to the end of the range of a number of material made irrelevant; and also as not to sponsive to the qu

The court denies the motion and counsel for defendant excepts to

the ruling.

A. Mr. C. M. Gute. C. H. Higgs came to the office of the Ossitant Mr. Company at Ossitantia and finite hits. Geter said he shought we ought to bring about a certifement in some way with the Dishrow Mrg. Company to an easy of the two charges which were then being manufactured together and stated that he had hids come conference either to stee or other together with the Dishrow Mrg. Company and he thought if the others of our company would go over to Manufact, that there eagle he consection with owns and in the way eliminate the competition that at that time existed between the Ossatanta Mrg. Company.

Que What position Mrg. Company.

All one president of that company and secured to lave charge of contenting the houses of the company.

One What position that company and secured to lave charge of contenting the houses of the company.

One What position that company and secured to lave charge of contenting the houses of the company.

One What position that company.

One What position that company and secured to lave charge of contenting the houses of the company.

One What position that company and secured to lave charge of contenting the houses of the company.

One What position that contents the might have held for I toglershoot he had charge of the Missospatis branch of their business.

One Toll what you can remember, if anything that Mr. Higgs might have all as he and Mr. Gates consolided together and Mr. Higgs might have all as he and Mr. Gates consolided together and Mr. Higgs might have all as he and Mr. Gates consolided together and Mr. Gates presented the about he of thinks about a fittink about together and Mr. Gates presented the about he of the consolided together and Mr. Gates presented the about he of thinks about the consolided together and Mr. Gates presented the about he of thinks about a fittink about the

e subject he wished to, I think also

Que Con you remain or of anything the Mr. Cares wild in reference to that only or before you write to administrate on that occurrent to if a reasonable scaling and the frought and if I would be to the part of the state of the

asked Mr. 2. J. Rows and Mr. Labara the same thing and we take the matter over and decided to go to Mankato and see what migh he done and the consideration of such for two or three days results n terminating in the contract referred to.

2. At that time did you go to Mankato alone or with Mr. Gates

A. I think Mr. Gates, Mr. Howe and myself went over together: r. Higgs came down later from Minneapolis, and Mr. H. M. LaBare

Constraint

Chap Where were the conferences held at Manhato which resulted to the making of this contract?

A. In a room in a hotel there, Hotel Pauly, I believe the name is tol Pauch des

Qas. Can you tell just how long those conferences took?

Well, it took the better part of three days and nights.

O26. How long did Mr. Cates remain at Mankato on that occa-

A. The whole of the time of the conference that we had, until after the contract was signed.

One, Did he take part in the meetings and conferences?

A. He took the principal part of contaiting with the officers of my company and also the Disbrow Mfg. Company and talked the matters over first with one and then with the other.

over first with one and then with the other.

Q28 How long did Mr. Higgs stay at Mankato at that time?

At I could not state definitely. He was there some of the time, but I don't think all the time.

O29. At some of the meetings before the signing of the contract of the Disbrow Mig. Company meet with the officers of the Owatonna Mfg. Company? That is, before the signing of the

Not until the afternoon to the last day of the meeting

One. And at that time, were the terms and conditions of the agreement fully agreed to or not? A Practically they were.

One Did anybody else besides Mr. Gates, conduct negotiations between your company and the Diabrow Mig. Company? I mean before the officers of the two companies me.

A. Not to my knowledg

Q32. During those negotiations and before the officers of the two companies met, will you state what Mr. Gates said and did?

Mr. Cohen. That is objected to on the ground that it is imma-terial and irrelevant, and that there is no authority on the part of Garage bild bay of the defendant

Well, in I before stated he said the object was to kning the

atters together as fast as possible, and as much as could be done to iminists competition and have it work in harmony together. And the enterement brought under one freed as much as possible.

Q33. Did you or did you not go with Mr. Higgs to the officers of

the Disbrow Mfg. Company and there see what took place between these officers and Mr. Gates before you met with the officers of the Disbrow Mfg. Company?

A. No, I think not at any time. As I stated at the last day of our peeting, when the propositions were submitted in writing both from my company to them and them to us and handed to me as least by Mr. Ir. Gates from the Dishrow Company to my own and also the case. rom my company to the Disbrow Mig. Company.

034. Who were present at the meeting at which the agreements

tere finally temperameter?

A. There was Mr. D. W. Payne, Reuben B. Dishrow, Levi Disow and Mr. Parsons, the attorney for a company, and Mr. C. M. Sates, Mr. H. N. LaBare, Mr. T. J. Howe and myself, and Mr. L. L. select which comitted to state before, as my attorney.

O35. Was Mr. Seely there?

A. I don't think he was there that night, and I don't think Mr. Higgs es, but he may have been.

Ogo. Please tell what part Mr. C. M. Cates took in negotiations

and conduct of that meeting?

A. Well, he acted as spokesman for both companies. That explains t about as near as I could

O37. Did be or did he not at that meeting give any reasons why at deal should be made?

Mr. Cohen. That is objected to as immaterial and irrelevant and se Mr. Gates had had no authority to bind any of the defendnte h

Objection overruled Defendants except

A. The reason he gave was an I stated before—so they could con-srol the output of both companies or both of those charms and have them in harmony rather than antagonizing in regard to trade.

One. Can you tell about how long prior to that time the Diabraw Mfg. Company had been conducting business at Mankato?

A. I couldn't say positively as to any length of time bit I think something less than a year or it may have been a little over a year.

Oso. During that time what was the husiness of the Disbrow Mig. Company

I think it was only the manufacturing and selling of the combined churn and worker they called the Winner.

Oso. And was the Diebrow Mfg. Company in competition with

the Curatopus Mig. Company? A. Yea.

is a from an Paul & Mawley's office in Temple Court, Minns

Mr. C. M. Geine, 100, T. S. Flowe, Mr. H. N. LaBare and my-leton excellent time response the was present all that time. Who was it mentioned the name of Bassell at that time?

ide, C. M. Cuin pai .What did in m

Ir. Cones. That is objected to as immaterial and prefevant. Objection organized Defendants extent

He said to connection with a remark he made to me, when I trying to have an amount of damage agreed upon that we were sing to fit with the F. B. Parge Company, that he wanted then to form me that I was not dealing with the F. B. Parge Company but you the Creamery Package Mig. Company that I had no settle this mer with that he controlled the F. B. Parge Company and several tree that are mentioned I think in that contract or an addition made about that data, of some other companies, and at that time he manned the more of Correll that he wanted to get control of. He the law of the law of the law of the state of the names mentioned in the contract, which I was are A. H. Barber. Cornish, Cardis & Greens, I think one or two others.

Our What contract do you mean by that contract?

A. The extlement with the W. R. Fargo Contract; in Jime, 15/8.

O.G. Who was Barrell?

servertised at hemy manufacturing as talling carry supplies

informing a combined thurn and butter worter?

I think he had one advertised at that time.

It is not remember the name of the churn? A. I do not less the full name of the Burrell Company or initials. A. I don't recollect.

Was Rittrell a competitor of the Owatones Mfg. Company think in this part of the country?

ir. Cohen. That is objected to us municipal and irrelevant i on the ground that it is read Objection (prescribed: Defende

I don't recollect of anything fastler show what I is comes of these companies that he did have sourced of a the Cammery Fastleys Company which will done to a content to a settlement with the F. B. Fargo Compan ciating at the time, about the Par their the signed in 1808.

Mr. Cohen. I move to strike out the words, "to influence me."

The court denies the motion and defendants except.

Org I would like to have you repeat as near as you can the teric that Mr. Gates made in connection with Burrell.

162. Cohe. That it objected to at immuterial into irrelevant and ther repetition of the same question.

Objection overnied. Defendants except.

A. Well, I can only repeat what I have said; that when I made demands for the damage and cost of the litigation that he can between my company and the S. R. Fargo Company my and the F. B. Pargo Company, th to see distinctly to understand that he represented the Creamery change Mig. Company and that it was him that I must deal with said the P. B. Pargo Company, as they owned at that time all of the F. B. ago Company), business and some others which he gave the names that were put in this clause following the contract made at that date said he should have control of others and mentioned Burrell's or as one and I think Hanney & Campbell of Dubsque, Iowa, as chiat he had the F. B. Fargo & Company, A. H. Barber & Com-le Cominh, Gurtis & Greene Company.

Qe6. Is your last answer a stabuliest as mear as you can give of it took place and what Mr. Gates said when he mentioned the ward ancel? on this occasion?

ir Color That it objected to it inquirers but included, and

Objection overraled. Defendants except.

A. I think that is about as I recollect it.

Please give the names of all the

is your present recognition)

The control of the margifacturing brances some 
an expectate with any from a belances here in Minnespe

to what from and what business?

It would the No Duno Machinery Company

Cot a concrete black asserblat manufacturing concern.

In long have you lived in Minicapolis?

Detwoon its and seem years.

Then you left the Owntowns Manufacturing Company, you to Rimserpolin did you? A. No, not right away.

You have been in other businesses since that time, have you?

Not in any manufacturing business except that I mentioned.

When was the Gratoms Manufacturing Company orga-

A. If aim not positive, but I think it was in the year 1868.

Q. And, as you say you remained with that company, as in tresident, until about the end of June 1898? A. Yes air.

Q. In testifying on your direct examination as regard to the contract made in April, 1897, and the contract made in June 1898, you had before you, had you not the copies of these contracts affached to like complaint in this section? A. No air.

Q. No you quite inflerstant my question, Mr. Ames? It is, sentine or not you did not have these contracts that I have mentioned, in your hands so as to determine the dates of them, when you were estiving directly on Saturday bat? A. No, I this not have them.

Q. Didn't you have the contracts before you, when you gave the same of the persons who were present at the estection? I mean, now the copies of the contracts attached to the complaint in this wife.

I had looked at the one giving the time of Time 4, 1868.

his from his per based in all at the so track of April 19th.

cate the training and the that companies a carding to your present resolutions at the most when April (oth 1897) that there's to, but abouted?

they were the proves per flower Block be die . As well-

O. You mean, then, Mr. Ames, that both of them were there as it some of the time?

. Yes sir. They were our attorneys; Mr. Pant as a putest ab-sey, and Mr. Wheelock as our local adviser at Owatonna.

Did Mr. Paul come to Owstonna at the time that Gates can re-preliminarily to your going to Mankato in April, 1897?

N. I don't recollect. I know that he did come there several time D. Vott refer now to Mr. Paul? A. Yes.

O. When you say "there" you mean Mankato, or Owatoona?
A. Owatoona.

Mr. Paul, at that time, in April, 1897, had some litigation for Owntonna Manufacturing Company, bad he not?

A. Yes sir. He was our atturney at that time; as I say, as pan turney, and worked with Mr. Wheelnek in regard to the litigat at we had.

Q. Mr. Wheelock, Mr. H. N. LaBine, and Mr. P. J. Howe, have died, have they not, since 1897? A. Who did you mention? Q. Wheelock, Lakere and Howa? A. Yes, sir,

). Mr. Paul old so business for the Overtonia Company, except h business as areas out of patents or patent litigation, did he? L. I think not. If you mean by that that any "litigation" would be ander the head of the write that we had, why, be was interested in and assisted in this with column compa

You understand the measure of the ward litigation, do you

Well I think so, so I supposed that that covered all of that

You understand that any lawsoit is a liligation, don't you?

And was Mr. Paul conducting or helping to consuct any liti-for the Owntowns Manufacturing Company is April, 1867?

Yes, six. I think he was

What was that litigation?

- - You were president of the exemploy during that time?
- Have you now stated all the litigation that, according to your literature. Mr. Paul was engaged in for the Owntown Company, pril, 1897?

  - A. I have stated all that I think of now.

    O. Then you have stated to the best of your present recollection?
- Q. Now, you have referred to some proceedings by the F. B. Range Company, against the Owatoma Manufacturing Company, in which Mr. Paul represented the Owatoma Manufacturing Company. Is it your excitestion now that that proceeding was pending in April,
  - I don't recollect
- Q. As to the time?

  A. At the present time. I have been sick a good deal, and my sensory is had shout fixing dates. And I am unable to answer that question any further than that.

  Q. Are you able to say, Mr. Ames, whether that Pargu proceeding that
- in interference in the patent office in regard to the District out-

  - A Year. O hwa watt A Year.
- Q. You mentioned a litigation with Cornish, Curtis & Greene. I If sake you now whether that was not a litigation that arose after
- A. I did not its the date to that. I married the question leading up to that by stating that Mr. Paul was our adviser during several pours, and it would include that; but whether it was at that date or
- (a) (a) will, thus, talk you this; whether you can make what litigation or consing in April, 1897—bear in mind the ciate, April, 1897—in take Mr. Park appeared for the Organizations Manufacturing Company? As I count my whether we had any litterates proding at that time and, from company. What I wish to be predictioned in to that Mr.

d was our stresser in regard to patents or infra , and to present might be on both to be a . Relation — A - Easter points.

As I understand your mixes level attrice reading to passe contracts, parent fittington, and your rights modes white to person your rights mades white to person your rights mades white to person your rights made within the person was increased in the contract of the cont

A. Yes, sir.
Q. And, herides that, he procured whatever patents the Ownload Company or the officers or stockholders of the Owstonia Company

A. Yes, et

Q. Calling your attention particularly again to April, 1897, I will ame you whether at that time, according to your present recollection, there was pending a suit by the Owatonna Manufacturing Company, against the Disbrow Manufacturing Company, for infringement of patents

A. I would not say positive, but I think that there was a notice

of infringement or tresspassing upon our rights, given to the Disbesse Manufacturing Company; how far it had gone towards what you

might term "litigation" I can't state.

Q. My question refers to a suit actually begun by the Owatouna. Meantfacturing Company against the Disbrow Manufacturing Co pury, for infringement of patents. Does your memory serve you at all as to whether or not such a suit was pending in April; 1897?

A. I think there had been some steps taken towards that, but

just how far, as I stated before, I am not able to say.

O. Perhaps you remember that time-in April, 1899-there had been a suit brought against the creamery at Cooleyville, to restrain that creamery from using a machine manufactured by the Disbrow Manufacturing Company. By "machine" I mean a com-bined churn and butter worker. Could you remember that? A. I think not, at Cooleyville.

Q. Now I will ask you whether or not according to your memory, at the time Mr. Gates came to Owstonna, the Owstonna Mannfacturing Company was claiming that the Distrow Manufacturi Company, in manufacturing and selling the Winner charm, was in-fringing upon the rights that the Owatonna Manufacturing Company sad under the Disterow patents?

I think so.

Q. The Distroy Manufacturing Company was in fact in turing at that time the Winner churs, was it not? I may April, 1897. A. Yes, air, they were.

Q. And the claim of the Owstonna Manufacturing Company at that time was that the Winner was being as manufactured contrary to rights which the Owstonna Manufacturing Company had under into with Reiben B. Distroy and D. W. Payne?

Do you remember the date (i) the

Can you say whether that agreement was made some time in thereshouts?

That original contract, I infer you mean. If so, I think it

Q. The churn and butter worker then manufactured and sold he Owateons Manufacturing Company (that is in April, 1897) was energie Disbray, was it not?

The churp and buner worker countractived and sold in April alloy, by the Diebrow Manufacturing Company, had two names; the "Winner"; and the "New Disbrow"; isn't that correct?

A. It seems to me that the report was that they first intended no call is the New Disbrow, but I think there was none ever put

out in that way, under that name. I am not positive,

Q. Are you able to say positive whether the churn being manucompany was advertised in any papers under the name of the "New

A. I don't know as a recollect that it was ever advertised as the

New Dishrow.

O Can you say whether or not the Disbrow Manufacturing Conpany claimed to maintincoure the Winner machine under my patent of the United States? A. I am not able to say.

I will ask you whether the Disbrow Company was not at that time claiming to manufacture the Winner claim under patents procured by Rouben Disbrow, as partly under patents procured by Reuten Disbrow, and whether the Owatonna Manufacturing Company obsered to the manufacture of the Winner on the ground that whatever work was done in regard to the patents claimed by Disbrow, authorizing the manufacture of the Winner on the ground that whatever work was done in regard to the patents claimed by Disbrow, authorizing the manufacture of the Winner. 2. For the purpose of calling the matter to your mind, Mr. Ann authorizing the manufacture of the Wanner, was done by Disbrow white he was in the employ of the Owatoma Manufacturing Company, during thus for which he was paid by the Owatoma Manufacturing Company? I sak you this question for the purpose of calling back to your memory possibly something in relation to those circumstances, if they are true.

duals recollect of that being force

estants, and you don't remember whether Remail Distroy had anything to do with any of the patents under which the Whener was some manufactured, if there were such patents?

A. I think they delived to have some patents; but, under the contract with the Owatours Manufacturing Company, the Owatours, Manufacturing Company the Owatours, delivers patents or improvements should belong to the Owatours, Manufacturing Company the name s those included in the contract.

O You teler now to the contract of 1893—as an approxim

A. 1893, yes, air; sometime in 1893.

Q. Have you the contract with you? A. No, sir.

Q. Your memory is that that contract gave to the Owatonna Manefacturing Company any improvements in churus and butter workers thereafter invented by Reuben B. Distrow or Darius W. Payne; in that your recollection?

A. That is what we claimed.

Q. And was it also your claim that the Winner churn was being equifactured under improvements in churns and butter workers invented by Reuben B. Disbrow subsequent to that agreement of 1803?

A I think so.

Q. Was it also the claim of the Owatonna Manufacturing Comany at that time that the Winner churn, as manufactured, infringed the Disbrow patents? I mean in and before April, 1897.

A. I couldn't say whether it claimed it infringed the original Dis-

row patent or not.

Q. You do not remember, do you, whether or not you made avif to a hill in equity brought by the Owatoena Manufacturing ompany against the Distrow Manufacturing Company in regard to hat Winner, in a suit that was pending in April, 189

A. I don't recollect the circumstances now. But, if tills were made to behalf of the company, or claims, I would be one of the proper

ficers to have signed them and I think I did.

O. Can you remember whether to April, 1807, the Creamery Packre Manufacturing Company was selling the Wisner churn and otter worker? A. I think they were.

O. Are your able to any whather they were doing so under an recences with the Disheow Manufacturing Company?

A I con't know what their agreements with the Dishrow M. tiering Company may bave been.

O. That it is not saying. Mr. Amer, that yet old not know its April 1897 is it? You are speaking of your pre-As I carly take, a sale

Q Do you know how long the Disbrow Manufacturing Co

had already been manufacturing the Winner up to April, 1809

A. I do not know; but my recollection is that it was less a year.

Q. Are you able to say whether in April, 1897, the Owaton Manufacturing Company had pending a suit against the Cream Package Manufacturing Company to stop the Greamery Package Manufacturing Company from selling the Winner churn?

A. I don't recollect that we did.

Q. Now, can you say whether when Mr. Gates came to Owatoma in April, 1897, the matter of suits then pending against the Disbrow Company or against some one or more creameries using the Winner machine, was discussed between you?

-A. Oh, I think it was

Q. Are you willing to say positively that it was?

A. I could not state positively at that time that it was, but it was our custom, when we met, to talk over all of those matters.

Q. Apart from that general custom, you have no distinct recollection now that you and Mr. Gates discussed this pending litigation at the time that he came up there to Owatonna in April, 1807?

A. I am not positive but I think we did.

Q. You said in answer to a question on direct examination, that at that interview with Mr. Gutes in Owatonna in April, 1897, he asked you if a reasonable settlement could be brought about if you would be willing to make an effort to have it done. What settlement did you refer to, in that answer?

A. What I had in mind, and I think was correct, was making some arrangement with the Disbrow Manufacturing Company; to make some kind of a deal with them; similar, perhaps, to what was made.

Q. You did not have in mind, when you made that answer, that there was then existing a suit in equity brought by the Owntonna Manufacturing Company against the Disbrow Manufacturing Company in respect to the Winner churn, did you? A. I did no

O. So far as your memory now serves you, was there or was there not a settlement made at Mankato, a few days later, which covered a suit then pending of the kind I have just described?

A. I think all matters pertaining to that business in any way were settled at or about the time that contract was made.

Q. Can you remember any conversation at Owatonna, of any kind, between you and Mr. Gates, which had reference to autos then pending by the Owatonna Company against the Disbrow Manufacturing

I don't recollect any particular conversation.

Q. At the time that Mr. Cates and you had your conversation in waterna in April, 1897, to which you have testified, was anybody

present but you and he? A. I don't recollect:

O. Now, when you went to Manisato, after that interview in Owatonia, the matters between the Owatonia Manisacturing Company and the Disbrow Manisacturing Company, and the Creative Package Manisacturing Company, were distinged for several days, you say, resulting in certain agreements made in Mankato on April 19th 1897; that is correct, is it not? A. Yes, six.

Q. When the agreement of that date between the Disbrow Manisacturing Company, Reuten B. Disbrow, Levi A. Disbrow, Darius W. Payme, and Horatio Seeley, on the one part, and the Owatonia Manisfacturing Company on the other, was assecuted, did you get a copy or a duplicate of that agreement on behalf of the Owatonia Manisfacturing Company? A. I think so.

O. Did you have occasion to refer to it afterwards, or did you

Q: Did you have occasion to refer to it afterwards, or did you simply take your counter-part and put it away, and that the end of it?

A. Why, all papers were left in the office there and filed away.

Q. I will sake you, Mr. Ames, to read over your copy of that agreement, shown as Exhibit B (9) in the complaint, so that I may then ask you whether the reading of that contract revives your memory of what occurred at Mankato on or about the 19th of April, 1897. Will you do so? A. Yes, sir.

Q. (Handing a paper to the witness) I would like to have you do so, because I think there are things there that will revive your memory, if you look it over. Have you now looked over exhibit B (9)?

A. Yes, sir.

Q. Does it revive your memory in any way as to what occurred at the meetings between you and Mr. Gates in Owatonna and in Mankato in April, 1897? A. It does somewhat.

Q. In what respect?

A. In regard to the litigation pending at that time between the Owatones Manufacturing Company and the Disbrow Manufacturing

Company.

Q. Your memory being thus revived, can you now recollect that there was lingation then existing between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company?

A. Yes, sin.

Q. And as to the character of that litigation is your memory revived somewhat?

A. Why, I bees it on the same as I did before-that they had no right to manufacture the churn they were making.

Q. Can you now remember that in point of fact the commencement of that suit by the Owatonna Manufacturing Company against the Dishrows and others was the very thing that brought Mr. Gates to Ovatonna when he came there a few days before April 19th, 1897, or a day or so?

A. That was probably one of the things anyway.

Q. Well then, your memory now being revived, would you now say that when you spoke about "settlement" in your answer on direct examination— reasonable settlement,", that you meant a reasonable settlement of the pending litigation?

A. The litigation, and the acquiring of-well-the business that

they were then doing, that we considered belonged to us.

Q. That is the real fact, is it not, Mr. Ames,—that you considered that the Dishrow manufacturing Company, in manufacturing the Winner churn and butter worker, was really manufacturing a machine in violation of your rights, and that whatever business they had in that machine really belonged to the Owntonna Manufacturing Company; that is true, isn't it?

A. I think it was, according to the original contract we had with

them.

Q. Do you remember now whether or not at that time, in April, 1807, the Disbrow Manufacturing Company was indebted in a considerable sum to the Creamery Package Manufacturing Company?

A. I don't know anything about it. -

Q. In 1897, did the Creamery Package Manufacturing Company have a branch office in Minneapolis, or a branch place of business?

A. I think they did; they did in St. Paul, at least.

Q. You have said in your direct examination that Mr. Higgs, as you understood, had charge of the Minneapolis branch. Your memory would not be clear on that, would it,—whether he had at that time charge of the Minneapolis branch, or was located in Mas-leato?

A. Not positive.

Q. At which of those two meetings—the one in Owatonna or the one in Mankato—did you say in your direct examination, that something was said about eliminating competition?

A. I think that was stated in Owatonne, but I am not positive.

Q. Who was present when it was stated, if you remember?

A. I couldn't say.

Q. Are you able to state now the exact words that were used?

A. No I would not state positively any words that may have been

Q. You would not say, then, that Mr. Gates ever used the expression "to eliminate competition" would you?

A. I would not say positively that he used the word "eliminate", but what he said would be to cover that ground—of controlling trade.

Q. But his exact words you don't remember? A. No, sir.

Q. You did not understand it to be a proposition from Mr. Gatas

to do corrething illeral and wrong, contrary to the laws, did you?

A I don't know that I took it in that way.

Q. You were there with Mr. Gates discussing a matter of interest in both of your Mr. Gates was interested in the Winner churn, because he was president of the Cresmesy Package Manufacturing Company, which company was selling the Winter thurn; you were in-terested in the same subject, because your claim was that the Winner churn was being manufactured and sold contrary to your rights; you had then pending a lawsuit against the Winner churn, for the very pu pose of preventing them in the future from manufacturing any more of those churus, coming together in that way, you discussed the situation. And now I ask you whether those are the true circonstances at that time existing as regards yourself, and Mr. Gates,

at Owatonna or at Manianto, when the matter of competition came up?

A. The Creamery Package Manufacturing Company were selling that Winner churn, and, as I believe, and did at that time, it was being manufactured contrary to the rights owned by the Owatonna Manufacturing Company under the terms of that contract made in 1893 with the Disbrow Manufacturing Company, or Disbrow and

Payne.

Q. You understood, did you not, that Mr. Gates' interest, or the Creamery Package Manufacturing Company's, was in that the Creamery Package Manufacturing Company was then selling the Winner chure, whose menufacture and sale you were seeking to have gropped by a suit that had then been brought? A. Yes, sir.

Q. According to your view, there was then no competition between the Disbrow Company and the Owatonna Company except such as arose out of what you asserted was the wrongful act of the Disbrow Manufacturing Company in the manufacturing and selling of the Winner

churn?

A. That is as I understood it.

Q. Have you any recollection as to the time when the Owatouna Manufacturing Company brought suit against F. B. Fargo & Company or the F. B. Fargo Company (I don't know which) for what you claimed was the infringement by the Fargo concern of the rights of the Owatonna Manufacturing Company under the Disbrow patents?

A. I would not try to fix any dates of that from memory.

O. It was at all events before the agreement of June 4, 1898 was made?

A. Yes, sir.

Q. Do you know, in point of fact, which was the first suit-the one against Pargo or the one against the Disbrow Manufacturing Company?

A. I don't recollect

fr. Paul there? A. Yes, six. Q. Is was in fact in Ms. Paults offices, was its in Minneapolik?

2. Did Mr. Paul and Mr. Wheelock, so far as your knowledg

ever, have consultations as to the form and substance of that April 1601, programmed A. I shinks so.

In your discrept examination are contained statements by you in the effect that Mr. Gates was doing all the regotiating on substanti elty all; you do not mean by that to say that your stronges were a working in your behalf in the matter of the contract of April, 186

A. No. 30. Who - released to thou Mr. Cares use the let were doing the work of—as the term is usually or very often usedpolessman, between the two parties.

On, he carried propositions backward and forward?

A That is what I / and by that, yes, air;

O The relative service the other of the Coulom County and the officers of the District. Manufacturing Company we such at that time, in April, 1897, that you cared about meeting them discouly; is that so? A. That is shout the way of it, y

O And if you did meet directly, you would be very age to got not heated discussions about one matter or another that had no relation to what you were dealing about, and the result would be that our negotiations would be bampered if you alternated to make them directly voterselves; in that right?

A. I think that is true.

Q. And so Mr. Goter carried from them to you their propositions, and from you to them your propositions? A. Yes, etc.

Q. You understood at the same time, that Mr. Gates, on behalf of the Greamery Package Manufacturing Company, was making another contrast with the Disbrow Manufacturing Company, did you

A Pale not more at that time of the

O Wolf. Mr. Ames, suit there such a contract referred to the contract entitle B (3) that proceed this meaning?

A. I don't understand of only that you may refer to these.

(). The Owstonna Manufacturing Company, was as that time making a contract with the Greamery Puckage Manufacturing Company, and did in fact make the contract on April 19th or 20th, 1807;

A. I think we should had a remove before that time, with the

O. Don't you remember that there was a new contract mode, a

Commery Taskage Manustonering Company)

A. There was a contract made with the Distrow Manustacturing The stry that the strong of th

A. Yes, if chalt is what you refer to, why, that is correct,
Q. Now, at the time there year, 1908, contracts were made, which
are existing B. (4) and B. (5), Mr. Getes informed you that the
creamery. Package Manufacturing Company had sequired the busmess of E. B. Fargo & Company, and you say, also told you that the Creamery Puckage Manufacturing Company had acquired the bus-fresh or some of the business, of A. H. Barber & Company. Did he tell you that he had acquired the business of—or that the Creamery Package Manufacturing Company had acquired the business of any concerns except those mentioned in the contract?

A. No, I think not at that time.

Q. Now, it was at that time that he mentioned something about forrell, was it?

A. Yes, he spoke of the name of the Burrell company.

Q. What did he say to you at that time about the Burrell Com-

A After he had made the statement to me that he would give me to understand that he was the man that I must settle with in regard to the Fargo Company, as he of his company owned the Fargo Company now, during our conversation, after I had learned that he mentioned the Burvell Company and A. H. Barber Company, and some others. He did not say that he owned them at that time, but he did say that he owned the Fargo Company, and that I must settle with him and not with the Fargo.

Q. Mr. Ames have you been in the employ of Mr. Virtue, in the atent litigation that he has had arising out of the churn and butter worker patents? A. 190, sir.

Q. You have testified in a miniber of stille, have you not?

Wants peace specifies ker sunda to a live Vitue to teles. Section uits, did you not? A. Yes, sir.

O. Did you testify as an expert in any one of the patent suits?

A. I don't know as you would call it an expert; I have been on

the stand several time

the time is consecutive of the time in force sains. did be not?

A. Yes, sir.

As much the type days?

- A. Why, including the present I think it would come close to that
- O. At how much per day?

  A. Unitally shout \$5,000, if I spent my full time.
- O. Have your relations with the Owntoning Manufacturing Com-may been pleasant since you left the company?

  A. Why, nothing implessing that I know of. I have no relations with them whatever, nothing to do with them.
- - Q. You have no bias or feeling against the Owatoma Company?
  - A. No. sit.

Reuben B. Disbrow, a witness produced and sworn on the part of the plaintiff, testifies as follows:

## Examination-in-chief by Mr. Reigard.

- Q: Where do you live? A. Owatonna, Minnesota.
- You are a little hard of hearing?
- A. Yes, I am deaf in this ear entirely.
- Your present residence is Owatonna? A. Yes, sir.
- How long have you lived there?
- A. I have lived there off and on for about eighteen years. I have lived there now since I was there last over three years.
  - Q. You formerly lived in Mankato, did you?
  - A. Yes air, I lived there.
- Q. What has been your business during the past fifteen or twenty years
- A. I have been in the creamery business most of the time, and mamifacturing combined churns and butter workers.
- Q. Have you also done some work along the patent line, you have, have you not?
  - A. Yes, sir, I have taken out several patents.
  - What churns if any have you invented?
- A. I was the inventor and patentee of the old Disbrow combined churn and butter worker, and the Winner, and I think I took out some other patents.
- Q. This Disbrow churn which you say you invented is the same churn that is now being manufactured by the Owatoma Manufacturing Company? A. Yes, sir.
- O. And the Winner is the churn that was manufactured at Manhato, some time during the year 1807? A. Yes, sir,
  - 1806 and 1897? A. Yes, sir.
- Are you acquainted with Mr. T. J. Howe, or were you aced with him during his lifetime? A. Yes, sir.

Q. And you are acquainted with all of the present officers of the Owstonia Manufacturing Company and its stockholders, are you not? A. I think so, very nearly all of them anyway. These might be some stockholders that I wouldn't be acquainted with.

Q. You are acquainted with Mr. Frank LaBar, and H. N. LaBar, ind W. A. Dynes ? A. Yes, sir-

Q. And Mr. T. J. Howe, during all his lifetime, I believe you mentioned? A. Yes, sir.

Q. Are you acquainted with Mr. Gates of the Creamery Package Manufacturing Company? A. Yes, sir.

How long have you known him? A I have known him since about 1895.

You are acquainted with Mr. Higgs? A. Yes, sir.

Q. C. M. Higgs? A. C. H. Higgs, I think it is.

How long have you known him? About eighteen or twenty years.

You knew him in 1807 and 1808? and along about that time? 0.

Yes sir.

You say you were in the manufacturing business at Mankato iome time during the years 1896 and 1897?

A. Yes, sir, we went to Mankato, and incorporated there in the fall of 1896, and manufactured the Winner churn there until about some time in April, 1897.

Q. Was the company manufacturing that churn a corporation?

A. Yes, sir.

O. You were incorporated?

Yes, sir, we were incorporated under the laws of the state of Minnesota

Q. Who were the officers of the corporation at that time?

A. I was president, D. W. Payne was secretary and treasurer; I think my brother, L. A. Disbrow was vice-president, H. N. Seelye was one of the company, I don't know whether he held an office or not.

Q. While you were there do you remember the circumstance of Mr. Gates coming to Mankato, at which time negotiations were had relative to a certain contract between the Owatonna Manufacturing Company and yourself with the Creamery Package Manufacturing Company? A. Yes, sir, I remember that

Q. You remember that circumstance?

A. I remember it very well.

O. When was it? A! It was in the spring of 1807.

You may tell the court and jury what occurred at that time, inning with the arrival of Mr. Gates, how he came to be there, and all the facts in connection with the making of those contracts.

Mr. Cohen. We object to that as immaterial and irrelevant and as

eng beginn negresie (nithe me. The Door, Athink the mention is a interior broad. I beat you will be more graphic. I think it is completed to show what took

- The before Mr. Cakes arrived how did you learn me kan to
- Our company received a letter from Mr. Gates from Chicago, tating he would be there the first of the week. I think we got he letter Saturday Selote.
  - Did he arrive at that time?
- A. He came there when I was away. I think it was on Monday or Tuesday of the next week.
  - Q. You say you were not there at that time? A. No, air.
    Q. When did you first see Mr. Gates there?
- Well, I was on a trip down in Iowa, and the company wired me to come back. It was the next day after I got back, which I Think was either Tuesday or Wednesday.

  O. Of the same week? A. Of the same week, yes, sir.
- Q. Upon your return you found Mr. Gates there, did you?

  A. No, he was not there when I first got back. I think he was in Owatonna at that time.

  Q In Owatonna? A. Yes, sir, that is what they told me.

  - You were simply told he was in Owatonna? A. Yes, sir.
  - How long after that was it before you saw Mr. Gates, or met
- A. The next morning. I was working down in the shop in the setting up room, in our shop.

Mr. Coben. That is objected to as immaterial and irrelevant, and average nothing to do with the issues of this case.

The Court. He may answer whore he met Mr. Gates.

- Witness. Mr. Gates came to the shop and called me to one side. He said he wanted to see me.

  13. Had you met him before that, or was that your first meeting with Mr. Gates?
  - Yes, sir, that was the first time I met him.
- When he called you to one side you had some conversation with him? A. Yes, sir.
  - What was that talk about, just tell what it was about first.
- A. It was about making some arrangement for as to stop manu-curing and make a contract with the Gwetoma Manufacturing Com-ty, and its them have all our patients our combined charges and suffer there and other things, and combine the whole business ander one

Q. Now you may tall the court and pay all all that conversal early so you can recalled it. Mr. District. Sires the conversal the world as their series.

Mr. College Percei objecto a la manufecta a

the Court greenite the deposits and some for a sponting

A When Mr. Cutes first came sper-

Mr. Cohen. You are simply to tell the conversation.

The Court. He should light himself to the conversation between

The Court. He should limit himself to the conversation between imself and Mr. Gates.

Q. State the conversation.

A. Mr. Gates came there and called me to one side, and asked me f. I didn't get his letter the week before. He says "I wrote you a some very important business", he says, I didn't expect you were going away." He says "What is hell did you go away for when you knew was coming?" I said "I didn't knew you were coming, and I had assness of my own to attend to." Mr. Gates says "You should know letter when I write to you that I would be here the first of this week a important business, than to go away." I says "Well, mise was interest business, if yours was important business," I says I was away attending to important business." I says I was away attending to important business too." He says "We have got to make different arrangements in regard to this hirs business," and he says "The Owatones Manufacturing Common bas got a suit against you here," and he says "We are carrying any has got a suit against you here," and he says "We are carrying his business for you," and he says, "The fusiness has got to be changd over." He says "We have got an arrang-ment agreed on that ou can get together on with the Owatouna Masurfacturing Com-my probably." and he said "What we have to do is to have you copie stop manufacturing, and make a centract with the Owatouna lanufacturing Company to turn over all your patents and improve-ients, and the patents that are new pending turn them all in toether, put all the patents in together, and contract with the O impetition." Then he says "You can get a good royalty, you wi see a good royalty on all church that are made," he says, "we con shabby nucles such a deal as that." He went on quite at length an-inuar that to me, and I listened to it all through.

Q. Did be at that time mention the same of the company?

A. Gie did at that time, but not just yet.

Q. What did you say to that?

A. Then when he got through explaining what he wanted to do. said to Mr. Gotes that I wouldn't do anything of the kind. I said I will not have anything to do with it whatever." I says "I have

dealt with the Dwatoins Maintracturing Company all I am going to do." Then he mid "Look here, God dama you, you will do it, or we will put you out of business." That is the very words he eard. I got mad and turned away.

Mr. Cohen. I move to strike out the last part of the answer of

The court denies the motion and counsel for defendants excepts to the rights.

Witness. I turned away and started back to the shop and left him. He called me to come back, he says "Come back and let us talk this thing over." I says "You have got to talk different to what you have been talking if you are going to talk to me. He saw I resented it and he cooled down a little. He said "I wanted you should get together and come down to the Sauipaugh Hotel and see if we can't get together and have this thing settled, and have all this litigation topped and a new arrangement made so that the whole thing shall be run under one head and under one control. In that way, he said they will control the whole churn business." He said "You will get a royalty on all of the combined churns and butter workers that are made and put on the market." I says "Well," I says "Mr. Gates," I says "You know that the Victor churn that F. B. Fargo & Company is making belongs to me."

Mr. Cohen. That is objected to as not being called forth by any question put to the witness.

The Court overrules the objection and counsel for defendants excepts to the ruling.

Witness. Then I said that the Owatonia Manufacturing Company agreed with me at one time to file an interference suit and have that putent re-transferred to me instead of Charles S. Brown, and they agreed to do it, and I said "If we make a deal at all this has got to be included with the rest." Mr. Gates says "That is all right, I will see that that is done." He says "I am in a position to see that that is done, for he says, "I can handle the F. B. Fargo Company, I am in a position to bandle that myself." He gave me to understand that. He says "I will see that that is done, and that patent shall be put in." Then he says "If any of the machines are made you will have a royalty on them."

Q. When did this conversation take place which you have just testified to?

A April 1887, just about the time of the making of the con-

A. So after Mr. Gates had explained that matter to me and aid that he would see that that was done, that that patent was put a with the rest, why. I finally agreed with him that I would go down to the hotel where the Owatouna Manufacturing people were or one of their representatives and their attorneys, that I would go town there, and he could talk with them and see what they a inted to do. So we went down there and we—I am not just positive whether they made us the first proposition, or whether Mr. Gates ame to us and we made a proposition of a royalty, but I think we made them the first proposition.

Q. Let me ask you this; when you went to the hotel with Mr. Gates, did you go into the same room with the representative of the Owatonna Manufacturing Company?

A. No, sir, I did not. I went into a separate room.

Q. You went into a separate room? A. Yes, sir.

Q. When you received an offer, as you say, the first one was sade one way or the other, how was that offer made?

A. It was made through Mr. Gates. He would come to our room and then we wrote on a slip what we would do, and he sould take it back to the other room where the Owatonna Manfacturing Company or their representatives were, and they would in return write a slip and send it back to us by Mr. Gates. He acted as meditator between us, carrying messages backwards and forwards there for the best part of two days and a night before we smally got together on an agreement.

Q. When you were making your propositions to be submitted to Mr. Gates to the Owatoma Manufacturing Company, did you make those yourself with other representatives of the Disbrow Manufacturing Company, or did Mr. Gates make any suggestions as to the kind

of proposition that you should submit?

A. Yes, sir, he did.

Q. Do you know as to what suggestions he made to you?

Mr. Cohen. That is objected to as immuterial and irrelevant.

The Court overrules the objection and counsel for defendant excepts to the ruling.

A. He proposed to us that we should make them a proposition at what price we would royalty the churn out to them exclusively, and put all our patents, everything we had, and all our improvements to be made in combined churns and butter workers.

Q. Did he advise you whether or not your offers were too high or too low?

A. Yes sir, he did.

Q. In that respect what if anything did he say?

disconer. That is concace to as announced been made than

The Court overriles the objection said counsel for defendants c

C. Go sheaf and nowwer the question.

A. He said that he thought can first proposition was rather high and at he thought we could afford to come down a little from that disables wanted to try and get together. Then he called my attention enticularly again to this fact, and he says "You won't be just getting that you make off one churn, but if there are two churns built or three, he says, "They will all he built and sold by us, and the Owatoma Canufacturing Company, and you will get a royalty on all of them." He says "You will have to take that into consideration".

Q. What charms were these, you said "All these charms to be musunctured," will you name them so we can know what they were?

A There was the Disagons combined churn and butter worker, and the Winner, and we had several other patents; Mr. Payne had one, and my brother had one, and I had some other patents pend-ing for elimbined charms and butter workers. They were all to be put in, and Mr. Gates said they would manufacture one or two of the best and out them on the market, and lay the rest of them by and ken then of the market

What if anything was said about royalties that you might receive from the manufacture and sale of the Victor churn? Was there anything said about your receiving royalties upon the Victor chura if it was built and used?

A. Na. di, tiare via

O. You may state what was said in that respect.

A. As I said before, Mr. Gates told me positively and gave me to inderstand that he would see that that was sub in with the rest, and if the Victor churn was made we should have a vioyalty on them just e same as any other ch

Q. In that conversation or the conversation leading up to the signing of char contract, did life. Gates state to you how he was able

c point than about?

A. Yes, sir, he did:

Non may make what he said in that respect .

tion. Process of parely is the second of the second second

the unit that he controlled the F. B. Pargo Company, and it and would on that that was done.

A: Yes, all:
Q. What position did he bodd at a.
A. He was president of the company
Q. Were there only other persons present at that tighting the Creamery Fackage Manufacturing Company? Were the thing the Green A. Yes, air.
Q. Who? A. Q. What

What were his coltrate or his given pune!

A His name is Charles: I think it is C. H. Higgs, if I rememelected (Class

Q. Did he take part in any of these conversations?

A. Why he talked there with us some and with Mr. Gates, but Ma... sates done the principal part of the business

Did you analty get together on terms? 0

A. Yes, sir, we did after. As I said before, I think it was the est part of two days and a night that we were there.

O How many contracts were made at that tree?

A. Well, there were two made and understood there was

Q. No, what you yourself know.

A. There was two made at that time.

Q. Whom were they between?

There was one between the Disbrow Manufacturing Comany and the Owatonna Manufacturing Company, giving them the achieve right to manufacture all the chieris under all these patents; d there was a second one made.

Mr. Cohen. Don't give the contents of these contracts, because ou might not have them accurate.

Q. This was about when about what time of the year and the outh as near as you can remember, Mr. Dishow?

A. Well, it was in April, some time past the middle of the month think when we made these contracts.

Q. You say that these negotiations extended over a provid of to or three days and nights?

A Yes, sic, the best par of it. Of course we generally quit out eleven or twelve at night.

O During all this time, Mr. Gates was the person who acted become you, that is, he carried these propositions back and fouth?

A. Yes, sir.

Q. I believe you stated that he suggested some of the matters be submitted by you to the Owatonna Manufacturing Company.

Is there anything in addition to what you he Mir. Gates said in that respect thering this b

A Year air

Q. While he was there? A: Yes, sir, there is.

Q. You may state what he said as near as you can remember, at different times, if there is anything more than what you have stated at that one time.

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. Mr. Gates said, he kept getting down the price, he wanted us to get together on this deal, and he said we might just as well get down to business. He pressed us pretty hard to put the price down.

Mr. Cohen. I move to strike out the last paragraph of the answer of the witness, as not being responsive to the question.

The Court grants the motion, and the latter part of the answer of the witness is stricken out.

Q. State just what he said.

A. Well, he said we had got to get together on this deal, because it had got to go through. He says "You must come down some on this," he says, and I told him that I wouldn't. We had quite a time over it.

Q. Just state what was said right along.

A. He said that we would have to get together on it. I can't remember the exact words he used, but that is the substance of what he said. He says "you will have to get together on this, and you may just as well make up your mind to come down some, and kind of equalize things up, and get together, because" he says "This deal has got to go through, and if it doesn't you won't have any churn business at all." That is what he said.

Q. Up to this time you had not seen any of the Owatonna Mannfacturing Company's representatives at all, had you?

A. No, sir.

Q. It was all done through the working of Mr. Gates?

A. Yes, sir.

Q. You say there was a contract made then between the Disbrow Manufacturing Company and the Owatonna Manufacturing Company?

A. Yes, sir.

Q. Was there another contract made at the same time?

A. Yes, sir.

Q. Whom was that between?

A. Between the Disbrow Manufacturing Company and the Creamery Package Manufacturing Company. Q. The Disbfow Manufacturing Company and the Citatory Package Manufacturing Company? A. Yes, sir.

Q. During the recess your attention was called to Exhibit B-9 and Exhibit B-10 of the complaint, was it not? A. Yes, sir.

Q. Did you examine them? A. Yes, sir.

Q. After having examined these Exhibits B-9 and B-10 respectively, you may state if you know whether or not they are in substance or in fact copies of the original confracts which you signed at that time. A. I should say they were.

Q. First Exhibit B-9 is dated April 19, 1907, was it signed on

or about that day?

A. I think it was signed up the next day, either that night or the next day.

Q. Then it was on or about that day?

A. Yes, sir, on or about that day it was.

Q. Was it signed at that time by the parties whose names appear

in Exhibit B-9? A. Yes, sir, it was.

Q. It appears to be signed by the following persons, the Disbrow Manufacturing Company, Renben B. Disbrow, president, and Darius W. Payne, secretary, and the Owatonna Manufacturing Company, D. J. Ames, president, and H. N. Seelye, secretary, was Mr. Seelye present at that time? A. Yes, sir, he was.

Q. You may state to the Court and jury whom you saw present at that time, when this contract was made, as representing the Owaton-

na Manufacturing Company?

A. There was myself and L. A. Disbrow.

Q. You don't understand me. After these negotiations had reached a point that you got down to sign the contract, then you met the representatives of the Owatonna Manufacturing Company.

A. Yes, sir.

Q. After everything was closed up, who were these representatives of the Owatonna Manufacturing Company who you saw there at that time, I mean representatives of the Owatonna Manufacturing Company?

A. There was D. J. Ames, T. J. Howe, H. N. LaBar, and Mr.

Wheelock their attorney.

Q. T. J. Howe, is the old gentleman Howe who is now deceased?

A. Yes, sic.

Q. You say you have examined this exhibit B-10? A. Yes, sir.

Q. And you say, or do you say that that is a correct copy of the contract which you signed at that time?

A. I think it is a correct copy of it.

Q. This is dated the 21st day of April A. D. 1897, was it signed on or about that date? A. Yes, sir, it was.

Q. You may emission Rabibits has; and state if you know whether or not that is a correct copy of the contract made on or about the 19th day of April 1807, between the Dishsow Manufacturing Company and the Creamery Package Manufacturing Company; there are no sign natures to that Exhibit.

A. Yes, sir, I think that is a correct copy.

Q. It bears date the 19th day of April 1897, and was signed by the Creamery Package Manufacturing Company and by the Disbros Manufacturing Company on or about that day, was it A. Yes, sir.

Q. You heard the deposition of D. J. Ames read here in the court

room this morning, dld you not? A. Yes, sir.

Q. Could you understand what was being read there at that time?

A. I could understand the most of it.

Q. Did you hear any portion of that deposition relating to the matters that took place at Mankato? A. Yes, sis.

Q. Were those the same matters to which you are now testifying?

A. Yes, sir, they are.

Q. And resulted in the making of the same contracts to which your attention has been called, respectively. Exhibit B-9, B-10, and B-11?

A. Yes, sir.

Cross examination by Mr. Cohen.

Q. Mr. Disbrow, at the time when you had your interviews that you have testified to here with Mr. Gates, there was some litigation pending, was there not, between the Owatonna Manufacturing Company, and the Disbrow Manufacturing Company? A. Yea, sir.

Q. What was the nature of that litigation?

A. The Owstonna Manufacturing Company had brought a suit against a party running a creamery who had bought and purchased one of the Winner churns, which the Disbrow Company had made a sale of to them.

Q. Then it was a sait for infringement of the rights claimed by the Owstonna Manufacturing Company under agreements then one standing in its favor with regard to the Disbrow patents?"

A. I think that was about right.

Q. The claim being that the Winner churn manufactured and sold by the Dishrow Manufacturing Company was an infringement of certain rights which the Owetonne, Manufacturing Company claimed under a prior agreement with the owner of the Disbrow patents

A. Yes, sir.

Q. Was there other liaigntism also pending at that time?

A. Not with the Disbrow Massefecturing Company, not that I know

Q. Was there any action pending at that time, except that one against the creamery, between the Owntonna Company and the Diebrew Company? As- No, 60, and disk! however.

Q. Where was that excessory situated against which that ection

A. In the our from Owntown's shout lifteen of twenty railes, I think

Q. What was the name of it?

A. It was Cooleyville, the Cooleyville creamery, I think.

O. The churn that was used by the Cooleyville creamery had been sold to it by the Commery Package Maanufacturing Company, had a not?

A. I think that the Disbrow Manufacturing Company sold that direct, if I remember right.

Q. You are not sure about that?

A. No, sir, I am not positively sure of it.

Q. At that time, is the building of 1807, the Creamery Package Manufacturing Company was selling this Winner church, was it not?

A. Yes, sir.

Q. And the 'Viener churn was then being manufactured by the Disbrow Manufacturing Company? A. Yes, sir.

Q. In the course of the conversation that you had there with Mr. Gates, was that litigation referred to? A. Yes, sir.

Q. Was there any other litigation referred to there that was contemplated, or that might thereafter arise out of the contract under which the Owatoma Manufacturing Company was claiming its rights?

A. Yes, sir, there was.

Q. What was that talk?

A. It was in regard to the suit between the Owatoma Manufacturing Company and the F. B. Fargo Co., of Lake Mills, Wisconshi.

Q. That suit against the F. B. Fargo Co., of Lake Mills, Wisconsin was started about that time, was it not?

A. I think it had been in progress some little time before that.

Q. How was the Disbrow Manufacturing Company, or how were any of the Disbrows interested in that suit against the F. B. Fargo Co., the suit brought against the Fargo Company by the Owatonna Manufacturing Company?

A. Well, myself and Mr. Payne, two of the company of the Disbrew Manufacturing Company, had a contract with the Owatonna Manufacturing Company to manufacture the Dishrow churn, which had not been terminated at that time; and Mr. Gates brought up the question as to having that matter settled, and as I said before also as to that other matter.

Q. He spoke about having that matter settled, and closing out that litigation and all litigation that might arise out of your prior contracts, is that right?

A. Yes, sir, he was going to settle the whole thing.

Q. All litigation arising out of your prior contracts? Now, Mr. Disbrow, in point of fact, there was several prior contracts outstanding made by your Mr. Soelye and Mr. Payne, in regard to the Disbrow patents, were there not? A. No, sir, not with Mr. Seelye.

Q. Not with Mr. Seelye? A. No, sir.

Q. But with Mr. Payne? A. Yes, sir, there was one or two.

Q. In the first place, you had a contract, did you not, and this was the first contract, by which you gave a right or license to the Owatonna Manufacturing Company to manufacture the Disbrow churn under the payment of a royalty? That was the first one, that was in October 1893, that is right, is it not?

A. No, sir, that was not the first one.

O. Which one was the first?

A. The one we made with the Cornish, Curtis & Greene Mfg. Co., of Fort Atkinson, Wisconsin.

Q. That was what date, or what time?

A. I don't remember the date of it, but it was probably a year or more before we contracted with the Owatonna Manufacturing Company.

Q. It was in August 1892, was it not?

A. Yes, sir, I think it was somewhere about that time.

Q. That contract with the Cornish, Curtis & Greene Mfg. Co., was canceled before you took up and made your arrangement with the Owatonna Manufacturing Company in October 1893? A. Yes, sir.

Q. After you had made your arrangement with the Owatonna Manufacturing Company in October 1893, you made another contract with the P. B. Fargo Company of Lake Mills, to manufacture under a royalty the Disbrow churn; and you made that contract subject to the rights of the Owatonna Manufacturing Company under its contract?

A. Yes, sir.

O. That is correct, is it not?

A. Yes, sir, to manufacture the Disbrow churn under the patents, and any improvements that I might have on combined churns and butter workers.

Q. That was in August 1894? A. Yes, sir, I think it was.

Q. Were there any other contracts outstanding on the Disbrow churns in April 1897? A. No, sir, I think not.

Q. Were the Disbrow churns in April 1897 manufactured by F. B. Fargo & Co.? A. I don't know whether they were or not.

Q. In April 1897, was the Fargo contract canceled, or was it still outstanding?

A. It was canceled some time about that date, I don't remember the

Q. Was not the Fargo contract canceled as a part of these negotiations in the settlement made in April 1897? A. No, sir.

Q. You don't know whether it was canceled before or after that time? A. I think it was canceled before then,

Q. Was there not pending in April 1897, in the District Court of Blue Earth County, Minnesota, Sixth Judicial District, an action brought by Reuben B. Disbrow, Darius W. Payne and Levi Disbrow against the Owatonna Manufacturing Company, or has that escaped your memory entirely?

A. I think there was an action brought against them down there to

have that contract set aside, or something of that kind.

Q. To have that contract set aside, and to have the respective rights settled, whatever rights you had under that contract, as to what they had, as to what you had, and as to what they should probably pay you?

A. Yes, sir, I think there was an action of that kind.

Q. And that action was pending in April 1897?

A. Yes, I think it was.

Q. That was a part of the litigation that was to be settled by the arrangement which was made at Mankato in April 1897, is that right?

A. Yes, sir, I think it is.

Q. At that time your relations with the Owatonna Manufacturing Company and its officers were not very pleasant, were they?

A. No, sir, they were not.

Q. They were decidedly strained?

A. Considerably so, yes, sir.

Q. You would not have a thing to do with them, nor they with you, with regard to any negotiations for a settlement of your difficulties? A. I don't know as to them, I know I wouldn't.

Q. You know you wouldn't? A. Yes, sir.

Q. And we have it from Mr. Ames, that they wouldn't. So there was a mutual repulsion. Another question, was there still not another quit pending at that time in the United States Circuit Court for the District of Minnesota, second division, wherein the Owatonna Manufacturing Company was complainant, and Reuben Disbrow, Levi Disbrow and Darius Payne, were defendants, do you remember that? That is a long time ago, is it not, Mr. Disbrow?

A. I don't know what you are referring to, I don't recall it just at

this moment.

Q. You don't recall it at this moment? A. No, sir.

Q. I have here a certified copy of the complaint, which if you would examine, I would like to have you examine it and see whether that brings up to your mind the pendency of that suit at that time.

Witness examines the paper handed to him.

Q. Can you now answer whether or not that case was also pending

A It seems to me that I can remember something about it. Of course Mr. Payers basis of after all that hind of business for us at that time, as I was occupied in the shop and very basy. It was just about the time, I see by the date, it was just before we had this macting at Manicato and made our contracts.

Mr. Cohen. It is dated April 15, 1897.

Witness. As I remember is I got a notice in some case at that time, but I had forgotten about it.

- Q. Then according to your best recollection, there was a case pending in the United States court between the Owatonna Manufacturing Company and you, with regard to some rights arising out of your contract with reference to the Disbrow patent; is that right?
  - A. It seems so, yes, sir.
- O. On April 19, 1897, you had outstanding; did you not, I am eaking now of the Disbrow Manufacturing Company, a contract made in the previous October with the Creamery Package Manufacturing Company? A. Yes, sir.

O. Under that contract the Creamery Package Manufacturing Company was selling the Winner churn, was it not? A. Yes, sir.

- Q. And in April 1897, the Disbrow Manufacturing Company was indebted to the Creamery Package Manufacturing Company in some sum secured by a mortgage on its plant, at Mankato, is that right?
  - A. Yes, sir, I think it was.
  - O. Do you remember the amount of that indektedness?
    - A. I think it was \$800
  - Q. \$800? A. Yes, sir, I think so.
  - That is your best recollection?
  - A. Yes, sir, that is my best recollection of it.
  - Q. Of course you den't speak positively as to that.
  - A. No, sir, I wouldn't be positive.
- When you came together therefore in Manksto, and Mr. Gates spoke to you about a settlement, Mr. Gates for the Creamery Package Manufacturing Company undertook to give up this agreement of October 1896, as to the Winner churn, did he not?
  - A. No, sir, he didn't say so.
- O. As far as your recollection goes, did he give it up as a part of that transaction?
  - A. Yes, sir, it was given up during that transaction.
- Q. At the time when you reached your settlement the Creamery Package Manufacturing Company's contract was disposed of by the settlement, was it not? A. Yes, sir
- d in the same settlement the contract with the Owatonna Manfacturing Company, in relation to the Disbrow, or in relation to the

Disbrow patents, was also settled and wiped out? A. Yes, six

Q. And the lawsuit as to the creamery at Cooleyville was settled and disposed of, was it sold A. Yes, sir.

O. At the came time? A. You, sir, everything was settled.
O. Everything was settled and wiped out? A. Vas, sir.

Q. You have a lawouit against the Creamery Package Manufacturing Company, too, have you not? A. Yes, air,

O. An action brought in the district court of Steele County?

A. Yes, sir.

O. In this state? A. Yea, sir.

O. How much claim or demand have you against the Creamery Package Manufacturing Company in that action?

Mr. Lench. We object to that as improper cross-examination, and as immaterial.

The Court overrules the objection.

A. The amount set up in the claim is \$350,000.

Q. Three hundred and fifty thousand dollars? A. Yes, sir.

Q. That is against the Creamery Package Manufacturing Com pany, and the Owatonna Manufacturing Company, too, is it not?

A. Yes, sir.

O. In that lawsuit you set up, do you not, the same transaction that you have testified to here today? A. I think some parts of it,

Q. Did you not in the complaint of that action, verified by you yourself, state that at that time Mr. Gates or some representative of the Creamery Package Manufacturing Company agreed to obtain a transfer of what you call the Victor patent to the Owatonna Manufacturing Company? Answer that yes, or no.

A. I don't know as I can answer that yes, or no, because I ain't positive whether that is in there or not.

Q. You are not positive about that? A. No, sir.

O. Did you swear to more than one complaint in that action?

A. I think I did.

Q. Is it your present statement that Mr. Gates told you that he controlled the Victor patent and would see that it was transferred to the Disbrows is that your present statement? A. No, sir.

Q. What is your present statement as to what Mr. Gates told you at that time in April 1807, about this matter?

A. Mr. Gates told me that he controlled the Fargo Company far enough so that he could handle that company.

Q. So far that he would or could do what?

A. That he could have that Victor patent retransferred over.

Q. Over to whom?

A. To the Disheow Manufacturing Company, or to me where it

belonged.

Q. Did he say to whom he would transfer it?

A. He said he would transfer it back to me.

Q. Did he say he would transfer it back to the Disbrow Manufacturing Company?

A. He didn't mention the Disbrow Manufacturing Company.

Q. He did not? A. No, sir.

Q. Did he say he would transfer it over to the Owatonna Manufacturing Company?

A. He said he would put it in with the rest, so they would all go in together.

Q. Did you understand that he was going to transfer that patent to you personally, and also to the Owatonna Manufacturing Company, from what he said there?

Mr. Leach. I object to counsel calling for the understanding of the witness as to that conversation.

The Court overrules that objection.

A. I supposed that was what he meant.

Q. What was it that you thought he meant?

A. That he was going to have it set back to me where it belonged. Of course it would go in then, if he done that, it would go into the Disbrow Manufacturing Company.

Q. But it was going to be set back to you?

A. It was going to be set in with the rest and be controlled by them, by the Owetoma Manufacturing Company and the Disbrow Manufacturing Company,

Q. He didn't say anything at all about transferring it to the Owa-

tonna Manufacturing Company, did he?

A. I don't know as he called the name of the Owatonna Manufacturing Company, but he said it should go in with the rest.

Q. If you stated in your complaint in that action, that he agreed at that time, or that somebody on behalf of the Creamey Package Manufacturing Company agreed at that time to transfer that particular patent to the Owatonna Manufacturing Company, that was an error, was it not? A. I don't know.

Q. At any rate, you swore to that complaint just about two years

ago, did you not? A. It is longer than that, I guess.

Q. Yes, it was in June 1907. Did Mr. Gates call that the Victor patent at that time?

A. He called it the Victor churn, the C. S. Brown patent.

Q. Do you know that there was no Victor churn manufactured at that time at? A. Oh, yes, there had been.

Q. Do you know there had been? A. I made one myself.

Q. Before April 1897? A. Yes, sir, I made one myself.

- Q. You didn't call it the Victor? A. Yes, sir, Q. With the name Victor on it?
- A. No, sir, I didn't put the name on it.
- Q. I am asking you about the name of the churn. Did he speak bout the churn as named the Victor churn?
  - A. It was afterwards named the Victor.
  - Q. Did he speak about the churn by calling it the Victor?
  - Yea, sir.
  - Q. He did? A. Yes, sir.
- O. Do you mean to say that the Victor churn was on the market inder the name of the Victor at that time? I mean in April 1897?
  - I am not positive whether it was or was not.
- Do you know when the churn manufactured under that particular patent was first called the Victor churn?
  - A. No. sir, I don't.

Redirect examination by Mr. Reigard.

- Q. During the time, Mr. Disbrow, that those negotiations were had at Mankato leading up to the making of the contracts to which you testified in your direct examination, was Mr. Paul, this gentleman here present?
  - A. I don't remember for sure whether he was or not.
  - Did you have any person there acting as your attorney?
  - Yes, sir.
  - Q. Who?
  - A. I had Mr. Parsons and John Day Smith of Minneapolis.
  - Q. They were present there at that time?
  - A. They were our attorneys.
- O. The question was asked if from the conversation which you had with Mr. Gates you understood that the Victor patent was to be transferred to you, or to the Owatonna Manufacturing Company, and I don't think you answered that question entirely, because you were interrupted. Just tell what your understanding was in fact:

Mr. Cohen. I will object to that, that is to that especial question.

The Court. I think I shall sustain the objection to that. I held it was proper on cross-examination, because the witness testified it was to be transferred to the Disbrow Company and also to the Owatoma Manufacturing Company. Mr. Cohen's question was, as I understood it, whether it was to be transferred to both. I will sustain Mr. Cohen's objection.

Re-cross examination by Mr. Cohen.

- Q. Mr. John Day Smith was your attorney you say?
- A. Yes, sir.

O. He is in the city of Minnespotis! A. You, our

O. And Mr. Parsons is still practicing him there? A. War, sir.

O. Mr. John Day Smith has been should to the beack as the district
at the r. A. Vas, sir.

Ywo certain papers are now marked Enhibits Rid and Des. he is present if by Mr. Cohen.

Mr. Cohen. I will ofter in evidence, as a part of the cross examination of this witness, Exhibit D-1 being the complaint in the action brought by this witness, Levi Dishrow and Barius Payne, against the Ownson. Manufacturing Company, is the district court of Blue Resth County, Minnesota.

Mr. Reigard. The plaintiffs object to it as being immaterial, according to the plaint offs of its a correct copy of the original complaint. It is not the original complaint, and has not been sufficiently identified, and no proper foundation has been laid for its introduction.

We Court. I do not think it is competent. I will evalue the objection

Counsel for defendants accepts to the ruling.

Mr. Cohen. I will now offer in evidence Exhibit D-2, which is the complaint in the United States Circuit Court, of the Owatoma Manufacturing Company against the Disbrow Manufacturing Company.

Mr. Reigned. We make the same objection to the introduction of Exhibit D-2 as we made to the introduction of Exhibit D-2.

Mr. Cohen. It is simply for the purpose of explaining and clarifying the testimony of the witness.

The Court. I do not think it is competent. The witness testified that suit was brought. I think it is sufficiently identified by the paper, but the subject matter of the suit, or as to what was in the complaint, I do not think is competent.

· Counsel for defendant excepts to the rolling.

Mr. Reigard. Plaintiffs now offer in evidence a certain paper which will be marked Plaintiffs' Exhibit P-3, being a list of the directors of the Creamery Package Manufacturing Company for the years 1898, the year 1900, inclusive.

At to that list we furnished it at Mr. Reigard's request as to avoid the necessity of making other proof. While we admit the list of rect, and we make no objection to this manner of proof to the cyliquity itself as amountarial and irrelevant.

The Court It being admitted that the list is a correct list, I will

Tomas for establish brooks to the real

Mr. Reigard reads in evidence the names of the directors of the reamery Package Manufacturing Company for the year 1808, with a understanding that the remainder of this exhibit may be read at v time

Levi A. Disbrow, a witness produced and swarm on the part of the sintiffs, testifies as follows

## Examination-in-chief by Mr. Reigard.

- O. Your name is Levi A. Disbrow? A. You at
- You live at Owatonia? A. Yes, six.
  You are a brother of Reuben B. Disbrow who has just
- 2. Plow old are you? A. Gr.
- O How long have you lived at Owntenna?

  A. I have lived at Owncomm about 14 years in the city.

  O. What is your present the of business?

  A. I am accretary of the Nerfection Chura Company.

- O. Have you been in the churn business more or less during that gth of time? A. Yes, sir.
  - O. How long? A. More or less for the last fourteen years.
- Q. Were you interested in what is known as the Disbrow Mass-suring Company, formerly located as Mankato, Missesota?
  - A. Yes, sir, I was.
  - Q: What position if any did you hold with that company?
  - I think I was vice-preside
- O. Who were the other members of the company?

  A. There was Mr. Payne, R. B. Disbrow and Horations N. Seelye.
- Were they all holding some office in the company?

  I don't know that Mr. Seelye held any office other than a direc-
- Your brother was president? A. Yes, sir. Who were the other officers of the company?
- Mr. Payne was secretary and treasurer, I think, I think he was. What was your business, what did you do as a transfacturing
- A. We were manufacturing the Winner churn and putting them of the mount through the County Prints Manufacture, County
  - Q. Through the Creamery Package Manufacturing Commany?

A. Yes, sir.

Q. Do you remember the circumstances of the making of the con-icus between your company and the Owatonna Manufacturing Comnany and the Creamery Package Manufacturing Company, some time during the year 1897? A. I do, yes, sir.

O. Who if anyone represented the Creamery Package Manufacturing Company during the negotiations for the making of these contracts? A. Mr. Gotes.

Where were the negotiations held? A. At the Saulpaugh hotel, Mankato.

O. At the Sanipaugh hotel, Mankato, Minnesota? A. Yes, sir.

O. Do you remember the circumstance of Mr. Gates coming there imbelf? A. Yes, sir.

O. About when was that?

A. Oh it was somewhere about the middle of the month of April, it might have been the 14th. Q. What year? A. 1897.

O. When Mr. Gates came there where did you first see him?

A. He came there to the shop.

Was your brother Reuben there? A. No, sir.

Q. How long did he remain at that time, Mr. Gates, how long was It be remained there at that time? A. Half an hour perhaps.

Did you have any conversation with him? A. Yes, sir.

In relation to this contract? A. No, sir, nothing.

Q. Did you have any talk with him relating to the manufacture of

A. Well, it was in relation to churn matters and my brother going away.

Q. What was said with regard to it?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court sustains the objection.

Q. When did you see him again?

A. Well, it seems to me this was on Monday that he came there, and he went away and was gone one or two days, I wouldn't say just when he returned. But I know that on his return he came into the office and went right through to the making room where my brother was. He went right along, without a word spoken, he went right along to where he was.

Q. State what conversation if any was had with regard to these con-

Mr. Cohen. We object to this as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants expts to the rolling

Mr. Reigard. State the conversation.

A. He stepped right into the making room, and he says to my trother, he saked him if he didn't get a letter stating that he was consequenced and would be here on Monday on business. He said he wanted to know of my brother if he had not received a letter, and my brother said he had; then he wanted to know why he went away after he knew he was coming there on important business. My brother told him he was away on business, and important business. He reprimanded him pretty sharply.

Q. State what was said.

A. He wanted to know what it hell he was away for when he told him he was coming there; those were the words he used. My brother says "If you are here on important business, state what your business is." Mr. Gates told him he had come there to see if he couldn't fix up the contracts existing between the Owatoma Manufacturing Company and themselves and us, so that we could draw a royalty on all the churns, on the Winner and the Disbrow, that were manufactured, and draw a royalty on all churns made. My brother told him he wouldn't listen to any such contract, and wouldn't talk with him upon any such business at all. He said if that was all the business he was there for he might as well go. Mr. Gates says "You will, God damn you if you dont you won't be in the churn business." He started away, and Mr. Higgs called him back.

Mr. Cohen. Mr. Higgs called him back?

Witness. Mr. Gates I mean called him back and wanted to talk with him, he stood there and they talked some time.

Q. Did you hear the conversation? A. Yes, sir.

Q. State what was said in substance, as you remember it.

A. Why, he said he wanted to settle up all litigation that there was between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company, and all disputes about the churn busines, as he wanted to get the churns together, and have all of them made under one head, and we would draw a royalty on all the churns manufactured My brother told him he wouldn't have anything to do with it, that the Victor churn was his churn which the Fargo people were manufacturing. He says it was his invention; Mr. Gates told him that he had such control of the Fargo Company as he could compel them to transfer it, and he would do so, and it should come in and be part of the consideration; and on that consideration my brother said he would meet them at the Sanipaugh House.

Mr. Cohen. Did your brother say"On that consideration", or is that yours?

Witness. No, sir, it is mine, on that consideration.

The Court. State just what your brother said.

Witness. I don't know as I can give the exact words, but he said "On those considerations we will come up and see what they have to any." It was something like that, it was in consideration of that, or something like that.

Q. What did you do?

- A. Mr. Gates told us to be there, it runs in my mind that he said for us to be there after dinner if my memory serves me right, and we went down to the Saulpaugh after dinner. I don't think we went before dinner.
  - Q. When you went to the hotel you went into some room?
    - A. Yes, sir.
- Q. Did you go into the same room where the Owatonna people were? A. No, sir.
  - Q. You went into a room by yourselves? A. Yes, sir.
  - Q. Who went into the room with you?
  - A. Mr. Payne, Mr. Seelye, Mr. R. B. Disbrow and myself.
  - Q. Was Mr. Gates with you?
  - A. Mr. Gates was with us when we went into the room, yes sir.
  - Q. Who had secured the room, yourselves or Mr. Gates?
  - A. Mr. Gates.
  - Q. What did Mr. Gates then say to you if anything?
  - A. Then he made a statement.
  - Q. State what he said.
- A. He said he had come there for the purpose of settling up all this litigation, and getting the patents all together and consolidating them, and have us accept a royalty on all churns manufactured and sold by them, or manufactured either by the Owatonna Manufacturing Company and sold by them, and that we should settle up our litigation and have everything settled, and make a contract in accordance with that, and we to stop manufacturing our churn.
- Q. Did he give any reason why he wanted you to quit manufacturing the churn, and why he wanted you to—

Mr. Cohen. I object to this method of cross-examination, as being leading.

The Court. I think he may answer. The objection will be overruled.

Counsel for defendants excepts to the ruling.

A. He stated that he wanted to stop all this litigation in the churn business, and have all of these things consolidated, and we would get a royalty on everything; that that would stop all outside parties handling churns, and there would be less churns on the market. He said

that if they manufactured one or two or three churns, whatever they did manufacture, that we would have a royalty on them. He wanted to get us to think seriously of the matter and not angrily of the matter. He talked quite a while, I can't repeat all the words he said.

Q. State the substance, as you can remember it. Do you remember of receiving any proposition tending towards the making of these contracts?

A. Well, before we did I told him what we wanted and would have to consider. The Brown patent or the Victor churn was what we wanted to have fixed, as he said he had the power to control the Fargo Company so he could compel them to turn it over. It was to be turned over, and my understanding was—

Mr. Cohen. I object to what the witness understood.

Q. State what he said? A. I can't give the exact words.

O. Give the substance.

A. It should be turned over, and we should have a royalty on all churns manufactured and sold.

Q. Did you say anything to him at that time as to what your proposition would be to the Owatonna people?

A. I wouldn't say whether we made a proposition at that meeting, or whether they made us a proposition.

Q. If a proposition was made by you or by the other parties, was it directly from the Owatonna people to you, or was it directly by you to the Owatonna people?

A. If we made the first proposition we made it through Mr. Gates, He requested it. He said we had got to do something of that kind and

settle these matters up.

Q. When you made a proposition to Mr. Gates what did he do with it?

A. He took it to them, went over the other side of the hall to the rooms where the Owatonna Manufacturing people were closeted and conferred with them, and then brought the reply back to us.

Q. During the time you were considering the propositions from the Owatonna Manufacturing people, or the Owatonna Manufacturing people were considering the ones that you made to them, did Mr. Gates say anything as to the kind of a proposition he should expect?

A. Yes, he did.

O. You may state what it was.

A. He dictated to us that we were too high in our estimates.

Mr. Cohen. I move to strike out the words "Dictated to us."

Q. State what he said, don't use the word "dictated," state what he said as near as you can remember.

A. He said we were too high, and we would have to come down in our estimations, and that we might as well get down to business and

get it done.

Q. What else if anything?

A. It is pretty hard to remember what we done for two or three days and nights and give all the conversation, I can't repeat it.

Q. You say it was two or three days and nights that all these negotiations continued between yourselves and the Owatonna Manufacturing Company through the medium of Mr. Gates?

A. Why it continued I think all of two days and nights, and over into the third day; but I think about 11 o'clock of the last night of the second day that we agreed upon making an agreement upon the royal-ties and contracts.

Q. You finally got together, did you?

A. Yes, sir, we got together.

Q. When you got together where did you meet the Owatonna people?

A. They were across the hall in some of the rooms I think, and we went to their rooms.

Q. You went to their rooms? A. Yes, sir.

Q. -Whom did you find there?

A. We found Mr. T. J. Howe, Mr. LaBar, the old gentleman Mr. LaBar, the old gentleman.

Q. H. N. LaBar? A. I think that is it.

Q. They are members of the Owatonna Manufacturing Company?

A. Yes, sir.

Q. Who else was there? A. D. J. Ames.

Q. Were there any attorneys present?

A. Mr. Paul was there and I think Mr. Wheelock.

Q. Whom did Mr. Paul represent?

A. The Owatonna Manufacturing Company.

Q. And Mr. Wheelock was representing whom?

A. I think he was an assistant, he was there with them.

Q. You say Mr. Paul was there?

A. Yes, sir, for the Owatonna Manufacturing Company.

Q. Then Mr. Parsons of Minneapolis was present, was he?

A. He was with us, yes, sir.

Q. And who else?

A. Mr. John Day Smith was there a part of the time.

Q. You finally signed the contracts, did you? A. Yes, sir.

Q. The contracts were signed on or about the dates appearing on them, were they?

A. I think they were. They were signed either on the 19th or 20th of April, 1907. I wouldn't be sure whether they were signed on that night or the next morning.

Q. You made another contract at the same time with the Creamery

Q. Who represented the Creamery Package Manufacturing Com-

Q. And that contract was signed at about the date named in the contract, some time in the latter part of April, was it?

A. It was signed there, I think it was either the 19th or 20th,

Q. Where were you selling your churns while you were manufacturing them at Mankato?

A. After we made the contract with the Creamery Package Manufacturing Company people in October the Creamery Package Manufacturing Company people sold the churns, we delivered the goods to them.

Q. You shipped them to Chicago, did you?

A. We shipped them wherever they ordered them.

Q. Did you ship any to Chicago?

A. I wouldn't say whether we did or not.

Q. Did you ship any into Iowa? A. Yes, sir.

Q. Did you ship any to other states that you remember?

A. I think they went to Illinois, Michigan, Wisconsin.
O. Any to the two Dakotas?

A. I dont remember any going to the Dakotas.

Q. At the time that contract was made was there anything said to you by Mr. Gates as to the prices of churns?

Mr. Cohen. Answer yes, or no.

Mr. Reigard. If there was anything said you may state the sub-

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection, and counsel for defendants excepts to the ruling.

A. Yes, sir, there was. He said that if he could get all these into one lump that the prices of churns could be controlled, as we would have all the churns on the market practically.

Q. Was there anything said as to prices after that?

Mr. Cohen. That is objected to.

Mr. Reigard. Or how that would affect prices?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection, and counsel for defendants excepts to the ruling.

A. Nothing more than we would have royalties, and that they would have the sales of all the churns, and that they would control them better.

Q. At that time when you were negotiating as to the contracts that you have testified to, you stated that Mr. T. J. Howe was present

A. No, sir.

Q. At the time of the signing of the contracts he was present, was he not?

A. I wouldn't say as to that positively. Whether we signed the contracts that night, or whether they were signed the mext day I wouldn't say positively, but that night Mr. T. J. Howe was there.

Q. You saw Mr. T. J. Howe sign these contracts for the Owatoma

Manufacturing Company, did you?

A. I can't call to mind just now whether we signed them that night or the next morning. We signed some paper that night, but whether it was a stipulation, or whether it was a regular contract, I can't say.

Q. Did Mr. T. J. Howe sign the regular contract? A. Yes, sir.

Q. For the Owatonna Manufacturing Company? A. Yes, sir.

Q. They were at that time? A. Yes, sir, they were there.

Q. Do you remember the time that actions were brought by the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company against Mr. D. E. Virtue and the Owatonna Fanning Mill Company, do you remember the time?

A. I remember about the time, I couldn't tell you exactly.

Q. Do you remember about what year it was?

A. I wouldn't be certain about that, I think it was about 1902.

Q. You dont remember the exact date? A. No, sir, I do not.

Q. But you remember the fact of the cases having been commenced?

A. Yes, sir, I do.

Q. Did you have about that time any conversation with Mr. T. J. Howe as to why or by whom those suits were commenced? A. I did.

Q. How many of those conversations did you have with him?

A. Oh, I had several conversations with him at different times. I met him frequently on the streets most every day.

Q. Do you remember the first of such conversation A. Yes, sir.

Q. You may state what that conversation was.

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court. I will sustain the objection on the same ground that I sustained an objection to a similar conversation, I think in the testimony of Mr. Frink. I do not think this is competent evidence against the Creamery Package Manufacturing Company. As to the other company, I do not think there is enough shown that these conversations were had in such a way as to connect them with the business of the Owatonna Manufacturing Company, so that a declaration made at that time would bind that company. I think these admissions are not such as would be binding upon that company.

Mr. Reigard. The object of this testimony is to show by these conversations the actual connection had by Mr. Howe, with the entire matter. His own statements and his own admissions might not possibly at this time bind the Creamery Package Manufacturing Company, but they would show the relations of the Owatonna Manufacturing

Company at that time, and he being the manager of that company would be presumed to have had charge of that litigation.

The Court. My view is that casual conversations had between a director and a third person, when the director is not engaged in the transaction of the business of the company, are not binding upon the company, and are not competent evidence for the purpose of binding the company.

Mr. Williamson. The point of that admission would be to show that both of these suits were brought and paid for by the Creamery Package Manufacturing Company, Mr. T. J. Howe was at that time president of the Owatonna Manufacturing Company, and made these statements to this witness, so that we do not connect him with that company.

Mr. Reigard. These are conversations had at different times with different officers of the corporation. We want to show the conversation between this witness and Mr. LaBar, the person who signed the complaint for the Owatonna Manufacturing Company. We also desire to show a conversation relative to these same matters had between Mr. Levi Disbrow the witness here and Mr. C. H. Higgs during the time the evidence was taken for the trial of these two causes then pending

The Court. I rule only upon this question.

- Q. Mr. Disbrow, you are acquainted with Frank LaBar, are you?
- A. I am, yes, sir.
- Q. Did you have any conversation with him during the time the two cases were being prosecuted against Mr. D. E. Virtue and the Owatonna Fanning Mill Company? A. Yes, sir, I did.
  - Q. Where was that conversation?
- A. I had a talk with him several times. Once in my office, once down at the foot of the stairs, and I met him on the streets.
- Q. Did these conversations have anything to do with or relate to the suits then pending? A. Yes, sir, they did.
  - Q. To the suits to which you have referred? A. Yes, sir.
  - Q. You may state what that conversation was.
  - Mr. Cohen. That is objected to for the same reasons already given. The Court sustains the objection.
- · Q. Did you have any conversation with Mr. LaBar during the time these actions were pending, which related to the business or conduct of these suits? A. Yes, sir.
- Q. Do you know if Mr. La Bar to whom I refer, I mean Mr. Frank LaBar one of the defendants here, holds the position of president of the Owatonna Manufacturing Company?
  - A. I don't know what position he holds, I presume so, yes, sir.
- Q. But it was the same Frank LaBar who signed the complaint commencing this action to which you have referred, do you know that?

- A. I do not.
- Q. You don't know as to that? A. No, sir.
- Q. You may state what that conversation was.

Mr. Cohen. I object to that on the same grounds as last stated, and as immaterial and irrelevant and as not binding upon the Creamery Package Manufacturing Company.

The Court. I will make the same ruling.

The objection is sustained.

Mr. Leach. During the time of the pendency of those cases you were living at Owatonna, were you?

Witness. I was.

- Q. Were you a witness in those cases? A. I was.
- Q. Was your brother Reuben Disbrow a witness in those cases?
- A. He was.
- Q. How many times were you a witness?
- A. I think I was called there three times.
- Q. Did or did not Mr. LaBar come and see you to get you to be a witness in that case on the part of the Owatonna Manufacturing Company?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants except to the ruling.

Mr. Reigard. Answer the question.

Mr. Cohen. Did he or did he not?

A. I am thinking. I will answer that in a moment, as soon as I can get my thoughts together.

Q. Did Mr. LaBare see you about your being a witness in that case on behalf of the Owatonna Manufacturing Company?

A. I don't remember that he did.

Q. Did Mr. LaBare see you about Mr. Reuben Disbrow, your brother, testifying in that litigation?

A. He did.

Q. Where was your brother Reuben Disbrow at that time?

A. He told me it was Las Vegas, California, or Nevada, I think.

Q. Where was that conversation between Mr. LaBare and yourself with reference to Mr. Reuben Disbrow being a witness in that litigation between the Owatonna Manufacturing Company and Mr. Virtue?

A. It was at my office, the first talk we had.

Q. Can you tell about the time, Mr. Disbrow?

A. Well, it was some time about the middle, from the 10th to the middle of June, about the 10th or 12th, somewhere along there, 1905.

Q. In that connection did Mr. LaBare ask you to do certain things about seeing Mr. Reuben Disbrow on behalf of the Owatonna Manufacturing Company.

A. He did.

Q. Now, will you tell the conversation which took place between yourself and Mr. Frank LaBare at that time.

Mr. Cohen. I make the same objection to that question as to the former one.

The Court. I think I will admit the testimony. I will overrule the objection, as far as the Owatonna Manufacturing Company is concerned, and I will sustain it as to the Creamery Package Manufacturing Company.

Mr. Cohen I will accept the ruling of the court.

A. Mr. Labare came into my office and requested me, he wanted me, he first said that my brother was coming as a witness, and that he was on the road and was going to start from Las Vegas on such a date on such a train, and he wanted me to go to Omaha and meet him, and see if I could not kind of induce him that he had better stay there and not come any further. I told him I wouldn't do it, that I wouldn't have anything to do with it. I didn't want to go any way. He finally insisted that it was my duty to help in this suit, as I was drawing royalties through the Disbrow Manufacturing Company on the Disbrow churn, and that I ought to go there and get him to stop off at Mankato where Mr. Paul the lawyer for the Creamery Package Manufacturing Company could meet him and talk with him before Mr. Virtue saw him. That was his words to me.

Q. Did you have any other conversation with Mr. LaBar?

A. I refused to do it, and told him that I had no money to run round and hunt up evidence for them or for either side, and I refused to go, and he went away.

Mr. Cohen. That is the end of that conversation, is it?

Witness. There was much more said at that time possibly.

Q. Can you think of anything more that he said at that time in that conversation?

A. I told him that I hadn't seen my brother for a good many years, and that we hadn't corresponded, and I didn't know that my broher would speak to me if I saw him, or would talk with me, and that I refused to go.

Mr. Cohen. Is that the end of it?

Witness. Yes, that is about all at that time.

Mr. Sperry. I now move to strike out this last testimony as immaterial and irrelevant.

The Court. I think I shall have to grant the motion. I do not see how it is material. The motion is granted.

Counsel for plaintiffs except to the ruling.

Q. After that time did you have a conversation in Minneapolis with Mr. Higgs in regard to those lawsuits?

A. Yes, sir, I did.

Q. In regard to the conduct of those lawsuits? A. Yes, sir.

Q. Who was Mr. Higgs then?

A. Mr. Higgs I think is the president of the Creamery Package Manufacturing Company of Chicago, Illinois.

Q. What was he doing there at the time of the conversation, and what were you doing there? First I will ask you what time was that conversation?

A. In 1905.

Q. What was Mr. Higgs doing there at that time?

A. I couldn't tell you what he was there for, but he was there.

Q. Did you have a talk with him in which he asked you about being a witness on the part of the Creamery Package Manufacturing Company against Mr. Virtue?

A. We talked about it, yes, sir.

Q. You did talk about it?

A. Yes, sir, but I don't remember all that was said.

Court bere took a recess until 1:30 p. m. the same day, at which time the case is proceeded with as follows:

CROSS-EXAMINATION of the witness Levi A. Disbrow, by Mr. Cohen.

Q. Did you say that you were the secretary of the Perfection Churn Company?

A. Yes, sir.

Q. Are you now? A. I am, yes, sir.

Q. Are you connected with the Disbrow Manufacturing Company?

A. No, sir, I am not.

Q. You are not interested in that company any more, are you?

A. No, sir.

Q. Have you a pretty clear memory of what occurred in April 1897?

A. I remember portions of it. I remember some things; I may not remember everything that was said and done, there was a good

deal said and done.

- Q. There were long negotiations there that covered two days, were there not?
  - A. Yes, sir,
- Q. It is your recollection that Mr. Gates there spoke of the Victor churn?
  - A. The Victor churn and the Brown patent.
  - Q. The Victor churn and the Brown patent? A. Yes, sir.
- Q. You didn't know whether the Victor churn was made at that time at all?
  - A. I didn't know much about the Victor churn at that time.
- · Q. And what Mr. Gates said was, that the Victor churn and that the Brown patent would be turned over, as I understood your testimony? A. Yes, sir.
  - Q. Is that right? A. Yes, sir.
  - O. That is what he said? A. Yes, sir, he said he had control.
- Q. He said he had such control over the F. B. Fargo Company at that time that he could make them do that, is that right?
- A. He said he had such a hold of them that he could compel them to do it, and would do so, and it should be turned over.
  - Q. That was not mentioned in the contract, was it? + here
- A. I think there is a clause, I don't know just what that is for that purpose, but there is a clause there.
  - O. I will show you the contract.
- A. I don't know as I can tell you what it was, if you show it to me.
  - Q. Which of the contracts was it, as you remember?
- A. I don't know whether it was in the contract with the Creamery Package Manufacturing Company, or the contract with the Owatonna Manufacturing Company. Mr. Parsons or Mr. John Day Smith called my attention to it that it was there, and what it was placed there for, but I don't know what it was, I have forgotten.
  - Q. You don't remember? A. No, sir.
- Q. But your understanding was from what Mr. John Day Smith or Mr. Parsons your attorneys told you, that it was provided for in one of these contracts?
  - A. Yes, air.
- Q. Either the contract between the Disbrow Company and the Owatonna Manufacturing Company, or the contract between the Disbrow Company and the Creamery Package Manufacturing Company?
- A. Mr. Parsons or Mr. Smith said that he didn't say so in so many words, that there was a little clause in there relating to that, that is what it was put in there for.

Q. So whatever arrangement was made about it with the Brown patent or the Victor churn, was, according to your information at that time, part of the contract?

A. I don't know, I supposed it was to be covered that way.

Q. That is what your attorneys told you about it, is that right?

A. They said there is some little clause in there that was relating to that, and it was put in for that purpose; that's all I know about it.

Q. How long did you remain with the Disbrow Manufacturing

Company as an officer or as a stockholder?

A. I think I was a stockholder of the Disbrow Manufacturing Company up to 1905, 1904 any way.

Q. After the spring of 1897 the Victor churn was manufactured,

was it not?

A. Yes, sir, I think it was.

Q. And it has been manufactured ever since, has it not? A. Yes, sir.

Q. You were an officer of the Disbrow Manufacturing Company during that time, you say?

A. I think while I was there at Mankato for one or two years after I was vice president, and after that, it might have been three years, I don't know just how long, I was president of the company.

Q. During all that time you were interested as a stockholder to

a certain extent?

A. Yes, sir, I was a stockholder and a director.

Q. You were a stockholder to the amount of about 25 per cent?

A. Somewhere along that line, not quite as much perhaps, say between 20 and 25 per cent.

Q. Between 20 and 25 per cent? A. Yes, sir.

Q. Between 1897 and 1905, was there any royalty paid by the Creamery Package Manufacturing Company to the Disbrow Manufacturing Company? A. No, sir, not that I know of.

Q. You never got any? A. No, sir.

Q. You never demanded any, did you?

A. I can't say whether it was or not.

Q. You personally never did? A. No, sir, I don't think I personally ever did.

Q. Did you on behalf of the company make any demand on the Creamery Package Manufacturing Company for royalties on the Victor churn?

A. Why, several times I insisted that the Disbrow Manufacturing Company should do so. There was one or two meetings in relation to it, but nothing was done.

Q. Nothing was done? A. No, sir, not that I know of.

Q. You knew during these seven years from 1897 down to 1904

or 1905, that the Victor churn was in quite general use, did you not?

A. Yes, sir, I did.

Q. There was quite a large number of them manufactured and sold?

A. I was aware that there was a good many, I didn't know how many.

Q. You didn't know how many? A. No, sir.

Q. Your talk there with Mr. Gates was that an agreement should be made so that the Disbrow Manufacturing Company should have a royalty for every churn manufactured by the Owatonna manufacturing Company, is that right? A. Yes, sir, and sold by them.

Q. Sold by the Creamery Package Manufacturing Company?

A. Yes, sir, sold by the Creamery Package Manufacturing Com-

Q. When you spoke in your testimony about there being a talk about your having a royalty on every churn made, you meant a royalty on every churn made by the Owatonna Manufacturing Company, is that right?

A. My understanding was made by the Owatonna Manufacturing Company and themselves and sold.

Q. Made by the Owatonna Manufacturing Company and sold by the Creamery Package Manufacturing Company?

A. Yes, sir, and I-

Mr. Reigard. I object to the witness being interrupted.

Q. What was said? A. That was my understanding.

Q. No, what was said to you?

A. It was said that we should have a royalty on all churns made by the Owatonna Manufacturing Company and sold by them, on every churn sold.

Q. On all churns that the Creamery Package Manufacturing Company sold? A. Yes, sir.

Q. Did you find that in your contract when you came to sign it?

A. I don't think it was in there. I don't remember of it being there now, just in that light.

Q. In point of fact did you, or anybody on behalf of the Disbrow Manufacturing Company, to your knowledge, ever make any demand upon the Creamery Package Manufacturing Company to pay any royalty upon any churn, except the churns that were made by the Owatonna Manufacturing Company and sold by the Creamery Package Manufacturing Company?

A. I think our secretary has written to the Owatonna Manufact-

uring Company that they should.

Q. You think the secretary of the Disbrow Manufacturing Company has written that? A. I think so.

Q. When was that done?

A. I think that was done perhaps in 1898.

Q. In 1808? or 1908? A. No, 1898.

Q. That is the only thing that you remember having been done by way of demand on the Creamery Package Manufacturing Company to pay any royalty upon churns outside of these that were made by the Owatonna Manufacturing Company, is that right?

A. That is all I remember of.

Q. That is all you remember of? A. Yes, sir.

Q. When you ceased to be an officer of the Disbrow Manufacturing Company, you sold out your stock, and these two things occurred at the same time; you ceased to be an officer and a stockholder at the same time, is that right? Or, did you cease being an officer of the Disbrow Manufacturing Company before you sold out your stock?

A. No, sir, I did not.

Q. You continued to be an officer of that company until you sold out your stock?

A. Yes, sir.

Q. In the spring of 1897 did you know of any other churn outside of those that were manufactured by the Owatonna Manufacturing Company and your company and the Victor?

A. It seems to me that I had heard of one called the Square, but

I had never seen it, and I didn't know anything about it.

Q. You had heard of one other? A. I think I had.

Q. There was no talk at that time that you were to have a royalty for the Square?

A. No, sir, there was no talk about that.

Q. Did you take an active interest in the manufacture of the Winner yourself, in the business of manufacturing the Winner?

A. Yes, sir.

Q. Did you take an active part in the business of the Disbrow Manufacturing Company in manufacturing and selling the Winner?

A. Yes, sir, I did.

Q. Did you know about the Fargo churn, style A and style B?

A. I had seen them, yes, sir.

- Q. There was no talk at that time by Mr. Gates as to the Fargo style A, and the Fargo style B, was there?
- A. I don't know what they were called. Only the Brown patent, it was designated as the Brown patent and the Victor churn that we were talking about.
- Q. Did you know at that time, or do you know now, that the Victor churn was manufactured under different patents from the style A and the style B churns manufactused by the Fargo Company?
  - A. I don't know what the style A churn is or the style B churn is.

I don't know them by those letters, or by those names.

Q. Did you know at that time that the Cornish, Curtis & Greene

Mfg. Co., manufactured a churn called the Wixard?

A. I knew that they were manufacturing a churn, I don't know if they were manufacturing it just at that time, and I don't know but they were; I wouldn't say. I don't think they were manufacturing the Wizard churn just at that time, but I wouldn't say positively as to that.

Q. Do you know whether the Cornish, Curtis & Greene Mig.

A. No, sir, I do not, except the Square Box.

Q. Did you know at that time of a churn manufactured by a company and called the National churn?

A. No, sir, I didn't know anything about it.

Q. When Mr. Gates asked you in that talk about stopping outside competition, did he mention any outside competition that he could stop?

A. No, nothing more than the churns that the Fargo people were making, and the Owatonna Manufacturing Company, and the ones

we were making.

Q. But as far as the churn that the Fargo people were making, he referred only to one churn, and that was the Victor, under the Brown patent, is that right?

A. That is my recollection.

Q. Did you hear the testimony of your brother here this morning? with regard to the litigation that was pending at that time in April 1807?

A. Yes, sir, I did.

Q. Isn't it a fact, according to your knowledge, that there were several suits pending at that time, litigation between the Disbrow Manufacturing Company and between yourself and others and the Owatonna Manufacturing Company?

A. There were several suits.

O. Several suits? A. Yes, sir.

Q. Is his enumeration of the suits and his statements as to them in accordance with your recollection of the suits outstanding at that time?

A. I think that is practically so. I think we were sned; I don't know whether he knew it or not, just a few days before this settlement took place by the Owatonna people.

Q. That was in the United States court?

A. I think so. I think there was a summons served on it. I don't know exactly the nature of the suit, there never came anything of



it. I never heard anything more of it.

Q. That was one of the suits that was settled by the contract, or the contracts that were made on April 19th and 20th?

A. Yes , sir, that is right.

Q. Then there was a suit against the Creamery Company at Cooleyville.

A. Yes, sir, that was here in this district.

Q. You knew about that?

A. Yes, sir, I knew about that. I think that was for this district, and the other for the Mankato district. Then I think there was a suit between the Disbrow Manufacturing Company, or Payne and R. B. Disbrow, to set the old Disbrow contracts aside.

Q. The old Disbrow contract of 1893?

A. Yes, sir, I think it was.

Q. And that litigation was closed up by this settlement, and wiped out of the way?

A. Yes, sir.

Q. That was one of the purposes of the settlement?

A. Yes, sir, that was the understanding, that was one of the pur-

poses, sure.

Q. Your relations, personal relations with the officers of the Owatonna Manufacturing Company were rather strained in April 1897, were they not?

A. They were hot of the very best.

Q: You had not only this litigation pending between you about the contract of October 1893, and that had been the cause of a good deal of expense between the Disbrows and Payne on one side and the Owatonna Company and their officers on the other side?

A. Yes, sir.

O. That is true, isn't it?

A. Yes, sir, the injunction suit too. They were getting our mail and so forth.

Q. There was an injunction suit besides the other? A. Yes, sir.

Q. For preventing them from getting your mail? A. Yes, sir.

Q. There was some trouble, was there not, at that time about the use of the word "Disbrow," as the name of the churn? And you proposed t ouse the name "New Disbrow," was not that a part of the trouble?

A. I don't remember that part of it, but there might have been

some such trouble. I don't remember that part of it now.

Q. When Mr. Gates came to Mankato and proposed to settle the difficulties, neither you nor your brother would meet Mr. LaBare and Mr. Howe to discuss that question with them; isn't that true?

A. I think that is practically true.

Q. So that Mr. Gates acted as a peacemaker to carry the proposi-

Mr. Reigard. I object to this as calling for the conclusion of the witness, and not a correct statement of the matter, as shown by the testimony.

The Court overrules the objection, and counsel for plaintiffs excepts to the ruling.

A. Well, I don't know exactly as you would call it a peacemaker, or what you would term it; he acted, going from one to the other, and he was very insistent all the way through during those days that we had got to do something, and had got to close it up. We had lots of talk and argument.

Q. Yes, you had lots of talk and argument, and in that he said what you have stated here about what he thought you ought to do, and you gave him a statement in writing of what you were willing to do on your part with the Owatonna Manufacturing Company, which statement in writing he took away from you to carry to the other side?

A. I wouldn't say we made statements in writing. I wouldn't say that. I think we merely made a verbal agreement telling him what we would do.

O. There was no writing?

A. I don't think there was on either side. I don't remember that

Q. Then he would come back from the other room with a proposition, didn't he, with an acceptance of your proposition, or with a refusal of your proposition?

A. Yes, sir.

Q. Is that right? A. Yes, sir, he came back.

Q. And you negotiated that way, submitting propositions from each other, and Mr. Gates acting in that way, as you have stated here, so it took you two days and two nights to make these various agreements, is that right?

A. Yes, sir, that is correct.

Q. During these two days and two nights you had your lawyers representing you, Mr. Parsons and Judge John Day Smith?

A. I don't think Judge John Day Smith was with us all the time. I think he came down the last day. Possibly he might have been there, I don't know about that.

Q. At all events, you can remember he was there part of the time?

A. -Yes, sir.

Q. Probably the last day and night? A. I think so.

Q. And Mr. Parsons was there all the time?

A. Mr. Parsons stayed there entil its close.

O. Were Mr. Parsons and Judge Smith at that time interested in A. I wouldn't say that he was or was not, I don't remember.

Q. They were the regular attorneys for the Disbrow Manufactur-

Company were they not?

Yes, str. they were.

They were not at Mankato at the time Mr. Gates came there ed made his first proposition, as you have testified to here?

A. No. sir.

After you began the negotiations you sent for your lawyers in apolis to have them come down to Mankato?

We did.

And they came down to advise you in that transaction, didn't 0

Yes, sir, they did.

Q. And they did advise you all through the transaction? A. Yes,

Q. Until the thing was ended? A. Yes, sir.

Q. At that time the Creamery Package Manufacturing Company had a contract with the Disbrow Manufacturing Company for the sale of its churn, the Winner?

A. Yes, sir.

Q. The Creamery Package Manufacturing Company also had a mortgage, did they not, upon the plant and machinery and fixtures of the Disbrow Manufacturing Company?

A. They didn't on the muchinery; we had rented that. They had

a mortgage upon our churns that we had made, and I think upon our

patents. I think that is what it was.

Q. How much was your indebtedness to the Creamery Package

Manufacturing Company at that time?

A. Well, it russ in my mind that we had paid them a portion of this, I don't know how much, but we had paid them part of the mortgage. In the first place it was something like \$2,000, it runs in my mind that way this morning.

Q. It was reduced, was it?

I think down to shout \$800, or perhaps less, I don't know.

That manager also went into the authorizent that was made time by those various contracts, is that right? Yes, air, that all went in

Do you know of your own memory whether this contract that made at that time between the Diabrow Manufacturing Com-and the Ountering Manufacturing Common required the Owa-Manufacturing Commons to pay regulties to the Disbrow Manof every kind made by it, whether under the Disbrow patent or under any other patent assigned to them at that time, or not, do you remember that?

A: I think there is something to that effect in a clause of the contract.

Q. Whether it was anything made after any patent which you had assigned to them or not, or under any patent under which the Owatonna Manufacturing Company made any churns?

A. Yes, sir, made any churn, no matter what it was.

RE-DIRECT EXAMINATION by Mr. Leach.

Q. When did you sell your stock in the Disbrow Manufacturing Company?

A. I sold my stock, I think it was in 1894 or 1895.

Q. 1894 or 1904? A. 1904, or 1905, I mean.

Q. Can you tell how many days it was before you signed this contract at Mankato in April 1897, when this suit was brought against you by the Owatonna Manufacturing Company?

A. No, sir, I cannot.

Q. What time was it, just a few days?

A. That is my impression now, I wouldn't be positive about it. It might have been a month.

Q. Had you taken any steps to defend that case?

A. I couldn't say. It was left with Mr. Parsons and Mr. Smith. Whether any steps had been taken I couldn't say. I was very busy, and was a good many times away on the road.

Q. In answer to Mr. Cohen's question you stated that Mr. Gates spoke about stopping the competition which existed between the Disbrow and the Victor, and your churn by that agreement; did Mr. Gates say anything of that kind, about preventing any competition in the future between these churns?

Mr. Cohen. I object to that as immaterial and irrelevant and as not proper re-direct-examination.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. Yes, he said that it would stop competition, that that was all the churns in the market that amounted to anything, and therefore he would get all the trade. It would eliminate competition practically; that is the words he used.

Q. Was there anything said about churns in the future and what was to be done about them.

Mr. Cohen. That is objected to as immaterial and hirelevant and as repetition.

The Court sustains the objection.

#### W. C. LAWSON,

recalled on the part of the plaintiffs, testifies as follows;

### EXAMINED by Mr. Leach.

- Q. While you were the buttermaker in the creamery in Steele county, did Mr. Stone the traveling agent of the Creamery Package Manufacturing Company, go there to that creamery for the purpose of selling goods to the creamery?
  - A. He did.
  - Q. Do you remember about what time that was?
- A. Why, I think it was in June the last year I was there, 1904. It might have been in May, it was the fore part of the summer.
  - Q. How long had you known Mr. Stone at that time?
  - A. Quite a number of years.
  - Q. What was his business or occupation?
  - A. Selling creamery supplies as long as I knew him.
  - Q. For what concern?
  - A. The Creamery Package Manufacturing Company.
  - Q. Did your people buy some goods of him?
  - A. Why, we did, yes, sir.
- Q. At that time when he was there visiting that creamery was he still selling goods for the Creamery Package Manufacturing Co.?
  - A. He was.
  - Q. Was that his mission there at that time?
  - A. That is what he said he came there for.
- Q. You say your creamery had bought some goods of him before that?
- A. I don't know that that creamery had, but the creamery that I had been with previous to that had been buying goods of him, so I was quite well acquainted with him.
  - Q. What churn were you then using?
  - A. I was using the Owatonna churn, I had just started to use it.
  - Q. You mean by the Owatonna churn one of Mr. Virtue's churns?
  - A. Yes, sir, one of Mr. Virtue's churns, a three roll churn.
- Q. Did he say anything to you about selling your creamery a different kind of a charu, one made by the Creamery Package Manufacturing Company, or a Victor churn?
  - Mr. Cohen. You may answer that by yes or no.
  - A. He did.
- Q In connection with that conversation; will you give us that con-

Mr. Cohen. That is objected to as immaterial and isselevant, as being a statement made by a traveling salesman of the Creamery Package Manufacturing Company.

The Court. I do not see how that is material.

Counsel for plaintiffs states to the court, not in the hearing of the jury or the reporter, what he proposes to show by this witness.

After hearing the statement of counsel the Court overrules the objection, and counsel for defendants excepts to the ruling.

Q. Will you give us that conversation.

- A. I had just started to use the Owatonna churn, we had had it but a few days, had it on trial, he was talking to me about the churn he was selling and stated that we were liable to get into trouble if we continued to use the Owatonna churn, as it was an infringement on their churn.
  - Q. Did you have any more conversation with him?
- A. Not with regard to the churn. Then he went and seen some of the officers of the creamery.
  - Q. At that time who were the officers of the creamery?
  - A. There was George Strandemo, he was there right at the store.
  - Q. How far were you from the store?
- A. Just a few rods, I don't remember just how far, but I didn't go with him any further, I just stayed there.
  - Q. You say this was in June 1904?
- A. I think it was the month of June 1904, the last month I was there.

## CROSS-EXAMINATION by Mr. Cohen.

- Q. That was a three roll churn, was it?
- A. Yes, sir, it was a three roll churn.
- Q. I suppose you don't know under what patent it was manufactured?
  - A. I don't know anything about it.
- Q. You don't know whether it was a churn that was afterwards the subject of an injunction in one of the lawsuits?
- A. I couldn't tell you. It was a three roll churn made by the Owatonna Fanning Mill Company.
- Q. Mr. Lawson, you were a witness in that patent litigation, were you not?
  - A. I was called before the examiner in Minneapolis.
  - Q. Did you not give testimony in the case?
  - A. I did before the examiner.
- Q. You gave testimony as to this very same machine, this three roll machine?

A. Yes, sir, the three roll muchine.

Q. And the three roll machine was the subject of that litigation?

A. At that time it was.

Q. It was a patent litigation of the Creamery Package Manufacturing Company against Mr. Virtue and the Owatonna Fanning Mill Company, that was the suit, was it not?

A. Yes, sir, that was the way I understood it.

### GEORGE STRANDEMO,

a witness produced and sworn on the part of the plaintiffs, testifies as follows:

### EXAMINATION-IN-CHIEF by Mr. Leach.

Q. Did you hear the testimony of the last witness, Mr. Lawson?

A. Yes, su.

Q. Are you the Mr. Strandemo to whom he referred?

A. Yes, sir.

Q. He said that Mr. Stone went over to meet a Mr. Strandemo.

A. Yes, sir.

- Q. Were you one of the board of directors of that creamery?

  A. Yes, sir.
  - Q. Was Mr. Lawson the buttermaker there at that time?

A. Yes, sir.

Q. Mr. Stone was there to sell some goods, was he?

A Not exactly, I don't know as to that, whether he wanted to sell me goods or not. He came up there, he knew I was one of the board, I suppose.

Q. One of the board of directors of the creamery? A. Yes.

Q. How long had you known Mr. Stone at that time?

A. I had not known him before, that was the first time I ever met him.

Q. Has he been there since? A. Not to my recollection.

Q. How did you know he was a traveling salesman for the Creamery Package Manufacturing Company?

A. He said so.

Q. Do you know how he found out or knew that you had bought Virtue churn? or put a Virtue churn in your creamery?

A. No, I don't know how he found it out; no, I couldn't say as to

Q. What conversation did you have with Mr. Stone there at that time?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants excepts to the ruling.

Mr. Leach. I mean with regard to the features of the combined churn and butter worker which you had in your creamery.

Mr. Cohen. That is objected to as immaterial and irrelevant, and also on the ground that any statements made by Mr. Stone, a traveling salesman, could not bind any of the parties to this litigation.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. Why, Mr. Stone he told me, at least he tried to tell me he thought I had bought the wrong churn.

Q. Tell what he said to you.

Mr. Cohen. Not what he tried to tell.

A. He said that we had bought the wrong churn. He said we were liable to get into trouble because we had bought that churn, and the reason that he had for saying this was this; He said that that infringed on their patent, and we would be liable to get into trouble on that account.

Q. Infringed whose patent?

A. Well, I suppose on their churn. I didn't ask him as to that.

Q. Did you say how long you had had the Owatonna churn at that time?

A. We had not had it very long, they had got it a short time before. I don't know how long we had had it, it was only a short time.

# CROSS-EXAMINATION by Mr. Cohen.

Q. What did you say was the time of this conversation?

A. I don't know exactly the date now, but it was in 1904, the first part of the summer, I think in June or something like that.

Q. Something like June? A. Yes, sir,

Q. It might have been July?

A. I can't recollect just exactly the date. I have got the check. This was about that time and after that we paid for the churn.

Q. You paid for the churn after that?

A. Yes, sir, that was paid for August 4th, I think.

Q. By your check paying for the three roll churn, you know the time when that conversation took place?

A. No, the conversation took place before that.

Q. Before and not after?

A. Before we paid for the churn, yes, six.

Q. You don't know what kind of a churn there was in litigation

between the Creamery Package Manufacturing Company, and Mr. Virtue, do you?

A. No, sir, I do not.

Mr. Leach. We will now read in evidence on the part of the plaintiffs and each of them the deposition of John W. Ladd, taken at Saginaw, Michigan, May 8, 1909.

(Mr. Williamson reads said deposition as follows:)

John W. Ladd, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

Ot: You live in Saginaw Mr. Ladd? A. Yes sir.

Q2. How long have you lived here?

A. Well, I have lived here since 1901, I was connected here in 1000, but I didn't make my home here that first year.

Q3. Where did you live before coming to Saginaw?

A. Adrian, Michigan.

Q4. Were you in the same business there that you are here?

A. No sir.

Q5. In what business are you now engaged Mr. Ladd?

Now engaged in the creamery and dairy supply business.

Q6. How long have you been engaged in that business?

A. Well, it was started in a small way in 1901, or 1902, in connection with the cheese jobbing business.

Q7. And your principal place of business? A. Saginaw.

Q8. Throughout what territory have you been selling goods during those years from Saginaw?

A. All over the state of Michigan and in a few cases in Ohio and Indiana.

Qo. Give a general statement of the nature of goods you have

been selling during that period?

A. We sell all kinds of machinery used in the manufacture of butter and cheese with the supplies for factories of the same nature, and a general line of dairy mensils and apparatus. We handle cheese alao

Que: Are you also a manufacturer?

A. Yes sir of creamery machinery.

Q13. Have you ever manufactured a combined churn and butter

refer? A. No sir.

Ora. What is the exact name of your company?

A. At the present time it is John W. Ladd Co., this is a corporaformed about the first of April, 1909. Prior to that it was Ladd

Bros., of which I was the sole owner.

"Q13. How long did you use the name Ladd Bros?

A. From 1901 up to the first of April, 1900.

Q14. And you were the sole owner of that business between those dates?

A. From about 1903 on to 1909 I was. Prior to that my brother Fred H. Ladd was an equal partner,

Q15. When your brother left you still continued the same name?

A. Yes sir.

Q16. Until you formed a corporation? A. Yes sir.

Q17. What office do you now hold in that corporation?

A. President and Manager.

Q18. Have you ever sold in your trade a combined churn and butter worker? A. Yes sir.

Q19. Between what dates have you been selling combined churns and butter workers?

A. It is hard for me to give you the first one I sold, but it would be about 1901, or 1902, up to the present time, we are selling them right along.

Q20. Did you ever handle the combined churn and butter worker made by the Owatonna Fanning Mill Co., which we call the Owatonna churn, for short? A. Yes sir.

Q21. Can you tell about the time you began to handle those churns?

A. I think it was about the first of the year 1905; I am not positive about that though.

Q22. And how long did you continue to handle and sell those churns as near as you can remember?

A. I think about six months.

Q23. During that period about how many of the Owatonna churns did you sell?

A. I think five, three of which were sold conditionally, and were returned to us.

Q24. Give the places to which those two churns were sent that you sold, and which were not sold conditionally?

A. One was at Coopersville, Michigan, and one at Wacousta, Michigan.

Q25. Which way and how far from Saginaw is Coopersville?

A. About 150 miles, it is northwest of Grand Rapids.

Q26. And which way and how far from Saginaw is Wacousta?

About 60 miles, near Grand Ledge.

Q27. Were the machines which you say were sold conditionally shipped to the places whence they were ordered? A. Yes,

Qas. Give us the names of those places if you can remember them?

A. Two machines were shipped to the Empire Produce Co. at Port Huron, one machine was shipped to the same people and was returned, as I remember it, to Saginaw, because it was too small, and was then sold to the Dudley Butter Co. then doing business in Saginaw, it was not the Dudley Butter Co. at that time, it was the E. F. Dudley.

Q29. Where was E. F. Dudley located?

A Principal office was in Owosso, Michigan.

Q30. Where did E. F. Dudley, if you know, send that machine, after they got it? A. Returned it to us.

Q31. What then became of the machine? A. It was scrapped.

Q32. What became of the other machine which was shipped to the Empire Produce Co?

A. I believe one of them has been sold to the Capac Creamery Co. at Capac, and the other sold to the Goodells creamery, at Goodells. These were sold by the receiver of the Empire Produce Co. No, that is wrong, one was sold by the receiver, and the other one, I believe was sold by Mr. Virtue.

Q33. In what state were those two creameries located?

A. State of Michigan.

Q34. Does that account for all the machines you sold for the Owatonna Fanning Mill Co? A. I believe it does.

Q35. In carrying out the sales of those churns were they shipped from Owatonna to your place of business in Saginaw before reaching the customer, or were they shipped directly from Owatonna to the creamery where sold? A. I believe they were shipped direct.

Q36. Is that true in each case as near as you can remember?

A. Yes sir, it is. With the exception of course of the one that was returned from the Empire Produce Co., and that was delivered to the Dudley Butter Co.

Q37. Are any of those machines still in operation?

A. I believe they are.

Q38. How many of them are still in operation?

A. I believe that four of them are being operated now.

Q39. Are they all in Michigan? A. To the best of my knowledge. Q40. Did you yourself, personally negotiate the sales of those ma-

chines, or conditional seles? A. All but one of them I believe.

Q41. Which one is the exception? A. The one at Coopersville.

Q42. How were those machines sold, by traveling men or by correspondence? A. They were sold by traveling men.

Q43. All the machines? A. I believe so.

Q44. After you began to handle and sell the Owatonna churn did you ever hear anything about any claim to the effect that that churn was an infringement of any patents? A. Yes sir. Q45. About when did you first hear that the Owatonna churn was claimed to be an infringement of patents?

Mr. Cohen. That is objected to as immaterial, incompetent and irrelevant.

Objection overruled. Defendants except.

A. Shortly after I made the first sale.

Q46. How did that knowledge come to you?

A. I believe the first intimation I had of that kind was from a firm of attorneys of Paul & Paul, I believe they are located in Minneapolis.

Q47. In what way from them? A. By letter.

Q48. More than one letter? A. I believe there was two.

Q49. Where are those letters now?

A. I have been unable to find them in my files. Q50. What search have you made for them?

A. I have made several careful searches, not only myself, but my employes in the office.

Q51. State in substance as near as you can the contents of those letters.

Mr. Cohen. That is objected to as immaterial, incompetent and irrelevant, and because no foundation has been laid for the admission of secondary evidence.

Objection overruled. Defendants accept.

A. The letters I received from Paul & Paul were in substance that the Creamery Package Co. or the Owatonna Mfg. Co. were suing the Owatonna Fanning Mill Company for an infringement on their patent.

Q52. Did you say patent or patents?

A. I think I said patents. And they warned me against selling these machines to the trade, giving me to understand that they would proceed against me, no they would hold me liable, as well as hold the users of the machine liable for any damages that might be incurred.

Q52. You stated that they gave you to understand that they would hold you liable, and your users, for damages. State as near as you can the substance of the language of the letters in regard to that.

A. That is very hard for me to state. It has been a good many years since that was written.

Q54. But you now remember the impression you received of the meaning of those letters at the time you received them?

A. Very distinctly.

Q55. Have you given us as you remember that impression which you received from shose letters at the time you received them?

A. Yes sir.

Q58. Did you see any of those letters?

Mr. Cohen. The same objection.

Objection overruled. Defendants except.

A. I believe that the letter written to the Wacousta Creamery Co. was forwarded to me.

Q50. Where is that letter now?

A. I am unable to say, I can't find it.

Q60. Give us the contents of that letter as near as you can remember?

Mr. Cohen. That is objected to as immaterial, incompetent and irrelevant, and because it calls for the contents of a written instrument, and no sufficient ground for the introduction of secondary evidence has been laid.

Objection overruled. Defendants except.

A. The letter was very similar to the one written me, advising them of the pending suit and that this Owatonna churn was an infringement on their patent. I also believe that they stated that users of the churn would be held liable for damages.

Q61. How was that letter signed?

A. It is my impression that this letter was signed by Paul & Paul, attorneys for the—I think it was signed as Paul & Paul. In that letter, however, they mentioned the fact that they were attorneys either for the Owatoma Mfg. Co., or the Creamery Package Co., I have forgotten which.

Q62. After you received knowledge of those patent suits what kind of business did you have in the sale of the Owatonna churn?

A. Naturally it was very limited.

Mr. Cohen. I move to strike out the answer, because it calls for the conclusion of the witness.

Objection overruled. Defendants except.

Q63. After you received knowledge of the infringement suits did your business of selling the Owatonna churn increase or decrease or remain about the same, or how?

A. It is very hard to compare it for I received this notice very shortly after the first churns were sold. We very soon afterwards discontimed the sale of these machines, however,

Q64. Please state the reason why you did so discontinue?

Mr. Cohen: That is objected to as immaterial and ir relevant.

Objection overruled. Defendants except.

A. Naturally we didn't like to lay ourselves liable to large damages on the sales of churns in this state, providing of course that the other

parties should win these suits.

Q65. You say "naturally", which might be urged as an objectionable method of answering the question on the trial of this case. Please state the fact as to why you did discontinue the handling of the Owafonna churn.

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. In my judgment I felt that it was not best for me to lay my concern open to litigation and liable for heavy damages providing this churn should prove to be an infringement; so we discontinued the sale of it, figuring that if there should be suits for infringement started on the small amount of churns we had sold we could stand them; but we didn't care to get into the matter too deep.

O66. After you discontinued the sale of the Owatonna churn what

combined churn and butter worker, if any, did you sell?

A. Sold the Simplex, made by D. H. Burrell & Co. of Little Falls, New York, and later on we have sold some of the Perfection churus made by the Perfection Churn Co., isn't it, of Owatonna, Minnesota:

Q67. About how many combined churns and butter workers have you sold since you discontinued the sale of the Owatonna churn?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection

A. I should say 30 or 40.

O68. All in the state of Michigan?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection

A. Yes sir.

Q69. In what portion of Michigan?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection sustained.

A. They were all in the Lower Peninsula, but very generally over the state, scattered over the state.

Q70. Can you tell about how many creameries are located in the Lower Peninsula?

Mr. Cohen: Objected to as immaterial and irrelevant: Objection sustained.

A. In the neighborhood of 400.

Q71. During the last several years, if you know, you may state what kind of churns have been in use mostly among those 400 creameries?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection sustained.

A. Do you want all the different makes or just haires in the ma-

Mr. Leach. The object of the question was to show a micropoly, and this evidence was introduced as bearing upon that question.

The Court. I will sustain the objection.

Q72. All the different makes.

Mr. Cohen: Objected to as immaterial and irrelevant. Objection

A. In order of their popularity I should say the Disbrow, Victor, Perfection, Simplex, and a few of the Owstonna.

Q73. During the last several years you may state, if you know, about what percentage of the total number of churns in use in those 400 creameries have been Disbrow and Victor, together?

A. I should say 90 per cent.

Q74. How many traveling men have you had on the road during the last several years?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection sustained.

A. Two and sometimes three.

Q75. Do those traveling men, and have they during the last several years visited all those 400 creameries?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection sustained.

A. Not all of them.

Q76. About what proportion?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection sustained.

A. Probably 90 per cent. of them, 85 to 90.

Q77. Have you done business, or had correspondence with nearly all those 400 creameries?

Mr. Cohen: Objected to as irrelevant and immaterial. Objection sustained.

A. We have had correspondence and done business with a good many of them; have solicited by mail business, I think, from all of them.

Q78. About the time you discontinued handling the Owatoma churn how general, if you know, had become the aboutedge or information that the Owatomia churn was claimed to be an infringement as you have certified?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overweld. Defendant except.

Quite general among the creamery trade.

Oyo. After it had become quite general and you tried to make sales of the Owstonia churn what reasons were assigned by proposed purdasers for not buying the Owstonia wom?

Mr. Collen: That is objected to as immuterial and irrelevant.

Objection overruled. Defendants except.

A. In some cases purchasers would intimate that they did not care to buy a machine that was tied up in litigation, and we soon after this law suit was generally known, discontinued the sale of these machines.

Q80. Did or did not either one of the letters which you received from Paul & Paul state anything about the name of the patents which they claimed were infringed by the Owatonua churn?

Mr. Cohen. I object to that as immaterial, incompetent and irrelevant, and I object to the answer on the ground that it is not responsive to the question, and also because there is no proof of any authority in Paul & Paul to write such letters.

Objection overruled. Defendants except.

A. After receiving their first letter I believe that I wrote them asking what their claims were, and in reply they cited, as I remember it, their claim covering a back gearing or two-speed gear for combined churn and butter worker.

Mr. Cohen. That answer gives the contents of an entirely different letter from that which was called for. There was no proof of any loss of or any search for that letter.

The Court. I will let it stand.

Counsel for defendants except to the ruling.

QBr. Those Owatoma combined churns and butter workers which you say are still in operation, what kind of work have they been doing?

Mr. Cohen: Objected to as immaterial and irrelevant. Objection

A. Very satisfactory work, as far as I know.

Cross examination read by Mr. Cohen.

Q1. Was your brother in business with you, Mr. Ladd, when you first started the creamery and supply business in Saginaw?

A. Yes, sir. At that time though, the business-

Qu. You can answer my question by just yes or no.

A. All right.

Q3. What was the nature of your business when you started here at Saginaw? A. We were wholesale dealers in cheese.

Q4 And when was that?

A. 1901, I believe in the month of May....

Qs. Was that simply cheese, or apparatus used in connection with

enmanus some of cheera

A. The first year it was principally cheese with just a small amount supplies sold for the manufacture of cheese.

Or in other words you were running a cheese jobbing house?

Ves sit

When did you extend your business to other dairy or creamery les, aside from cheese? A. I believe it was the following year.

t particular line did you first then take up?

We first took up a more extensive line of cheese factory ma-and then readually worked into a line of creamery machinery. And that business has been constantly growing? A. Yes sir, and the number of your salesmen been increasing?

A. licreasing.

Oth. Yes. A. This year we haven't as many as we had last year.

A. This year we haven't as many as we had last year.

Ota. How shout prior to this year?

A. Been about the some, that is for the last several years.

Ota. And during the last several years you have had 3 or 4 traveling men on the road? A. I said 2 or 3.

Ota. When did you first send traveling men out on the road to sell dairy or creamery supplies? Exclusive of cheese, if you did have such men? A. I first did my traveling myself in 1901.

Ota. How long did you continue to travel?

A. I think it was until 1904.

Q16. Was there anyone on the road traveling for you, aside from purself, during that period? A. 1901 to 1904?
Q17. Yes. A. I believe not.

Then as I understand it, after 1904, you remained at your me office and traveling men took your place, is that right?

no a cartain extent ye

Q19. To what extent?

A. I traveled as much myself as I could get away from my home ice. In 1904 I did quite a good deal of traveling myself,

How about after 1904?

did considerable traveling in the nearby territory right up to the

221. No.: when did you first commence to manufacture dairy or y supplies? A. About December 1906.

O22. What were the first materials you started to manufacture?

A. Started in to manufacture cheese vats

Mr. Cohen: The further cross examination of this witness is not

Mr. Lench: We offer to read the cross examination of the witness, ginning at the place where commel left off./
(The cross examination of the witness is then read by Mr. William-

n as follows:

Q23. Then what did you follow that with?

A. Other tinware, starter cans-054. Where are they located?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled Defendants except.

A. The Saginaw Produce & Cold Storage Co., which is a branch, elieve, of the Creamery Package Co., in Saginaw, the Riverside Commy, of Adrian, deal in cheese factory supplies

Q55. My question was: Are there any other dealers in creamery nd dairy supplies who have their offices or places of business in the tate of Michigan and who do business in the same territory in which

ou do business?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. I think my question quite fully answers it.

Q56. Wait until I get through with my question. The Notary ill now please re-read question 53.

(Question 55 read.)

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes.

Osy. Will you please wait until I finish my question?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes sir, I thought you had finished your question.

Q58. The witness will not answer, please not answer until I get brough with my question. Are there any other dealers in creamery nd dairy supplies who have their offices or places of business in the tate of Michigan and who do business in the same territory in which on do business, whose home office is in the state of Michigan.

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Whose home office? Yes sir.

Qso. Who are they?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. The Riverside Company at Adrian: I am not positive as to e home office of the Saginay Produce & Cold Storage Co.

Q60. Outside of the Creamery Package Manufacturing Company

and the two persons you have just stated have their home office in Michigan, what other persons, firms, or corporations, sell, thairy and creamery supplies in the same territory in Michigan in which you deal?

Mr. Cohen: That is objected to as immaterial and irrelevant.
Objection overrulet. Defendants except.

A. The National Creamery Supply Co. and A. H. Barber Creamery Supply Co., of Chicago, and the Burnette Building & Supply Co., of Tokelo, Ohie.

Q61. Is that all you know do business in this state?

Mr. Cohen: That is objected to as immaterial and irrelevant.
Objection overnied. Defendants except.

A. Yes sir, to my knowledge.

Q60. Does D. H. Berrell & Co. do business in this state?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Not directly,

Q63. What do you mean by not directly?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. They do not sell to the creameries direct.

Q64. They advertise, do they not, and also send out circulars to the public, or those engaged in business in this state?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Yes sir.

Q68. Oakes & Berger of Catarragus, N. Y. are large dealers in creamery and dairy supplies are they not?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. I believe they are fairly large, but they are in the East?

Q67. You receive circulars from them, of their business?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Yes sir.

Q68. And they send out circulars and advertisements as to their business generally over this state, do they not?

Mr. Coben: That is objected to as immuterial and irrelevant.
Objection overruled. Defendants except.

Qoq. Your knowledge is simply as to the circulars you receive, is a not?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. No sir.

Q70. What is your knowledge as to that?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. If the circulars we spoke of were in the hands of the trade we would naturally see them and hear of them, but we do not bear of them.

Q71. By "we" you mean who?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. My concern and salesmen.

Q72. Your concern is a corporation, is it?

Mr. Cohen: That is objected to as immaterial and irrelevant,

Objection overruled. Defendants except.

A. Yes sir.

Q73. Does A. H. Reid of Philadelphia, advertise dairy and creamery supplies in this state?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

Not in a general way.

Q89. You have stated there were five Owatonna churns which were sold by you, one was sold by Mr. Virtue after it was returned to you. When did Mr. Virtue sell this churn?

A. I do not remember the date.

Q90. Well as near as you can fix it, give us the date as near as you can fix it.

A. It was sometime in 1906 or 1897-1906 I think.

Qor. Well, which year was it?.

A. I think it was 1906.

Qoz. What time in the year? A. I can't tell you.

Q93. Do you know to whom he sold it?

A. It was sold to the Capac Creamery Co., I believe. Say, I would like to change my testimony there, if I can. This—I made arrangements for the sale of that churn for Mr. Virtue, but the papers or contracts were signed by him and were to go to him.

Q102. Aside from the warnings which you say you received from

Paul & Paul in regard to the sale of the Owntonna churn have so ever heard of the Creamery Package Mufg. Co. or the Owatons Marfg. Co. threaten the dealers or users of any other churn to inst tute suits either to enjoin them from using such churn or for damages

Mr. Cohen. We object to that as inamaterial and irrelevant, and calling for statements not within the knowledge of the witness, but mere hearsay

Objection overruled Defendant except.

A. I have heard of the letters which were written to the creameries from Paul & Paul, and I have heard from the trade that the salesmen had advised them, or in other words threatened them with

suits if they purchased churns infringing on their patents.

Q103. My question is intended to cover churns manufactured by people other than the Owatouna Fanning Mill Co. Have you heard of any threats being made by either the Creamery Package Mnfg. Co, or the Owatonna Mnfg. Co., or anyone for them against the use of any other combined chunr and butterworker aside from the Owatonna churn?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Yes sir.

Q104 What churn? A. The Perfection churn.

O105. Are there any other churns aside from the Owatonna churn and the Perfection churn which you have heard threats from either the Owatonna Mnfg. Co. or the Creamery Package Mnfg. Co.

A. Not to my knowledge.

Q106. When did you hear such statements as to the Perfection churn?

A. About a year or a year and a half ago, when it first came out. Q107. How did you get such information?

A. From one of their representatives.

Q106. Whose representative?

A. Creamery Package representative.

Q109. Where was it? A. In this city.

QIIO. What patents, if any, did he state the Perfection churn was infringing?

A. He did not state positively that they were infringing a patent, but expressed himself as of the opinion that they were infringing a patent of a single roller churn which the Creamery Package Co. he claimed had built some years previously. And that if this was e case of course his company would prosecute the patent.

Mr. Cohen. I will move to strike out all the evidence as to the

ser de-ton -north and introgenants.

The Court. I will let it stand.

Counsel for defendants excepts to the ruling.

Qitt. Can you fix the date when you first received the letter which you state you did receive from Paul & Paul relating to the Owatonna churn?

A. Only approximately.

Q112. What year was it? A. I believe it was 1905.

Q113. What time in 1905?

A. Sometime in the spring, probably in March or April.

Q114. Where were you when you received it?

A. In my office.

Q115. Here in Saginaw? A. Yes sir.

Q116. What was the date you received the letter,—the second letter from Paul & Paul?

A. I suppose a week or two after the first one.

Q117. Did you have any talk with any of the five persons to whom you say you sold the Owatonna churn, in regard to the claims made by either the Creamery Package Mnfg. Co. or the Owatonna Mnfg. Co. that such churn infringed their patents? That means you personally?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes sir.

Q118. Which one of the five persons referred to?

A. Colon C. Lilly of Coopersville,

Q120. Was he an employe of one of the parties named?

A. He is the president of the Co-Operative Creamery at Coopers-ville,

Q121. Did you have any talk with any of the other four parties or their employes?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes sir.

Q122. Which ones?

A. Mr. Nelson, manager of the Empire Produce Co., and I believe Mr. Duell, buttermaker for the Wacousta Creamery.

Q123. Were either of those conversations before or after you had received the letter that you say you received from Paul & Paul?

A. I believe they took place after.

Q124. Now please state what patents you say Paul & Paul mentioned in either of their letters the Owatonna Fanning Mill Co. was infringing in the use of the Owatonna machines, by name, if you can, if the name of any patent was used?

A. I do not remember the many, but I are under the impression that one was the patent covering the two speed or back gear, and there was some other patent mentioned, but as I remember it it was described by number.

Q125. Were there more than two patents named or referred

to in such letter?

A. I am under the impression there were three.

Q126. What is your recollection? A. That there were three,

Q127. Are you positive there were no more than three?

A. No sir.

Q128. All you now recall is that there were at least three patents mentioned?

A. That is my recollection,

Orgo. What price did you sell the Number 6 churn for?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. My recollection is about \$185.00.

Q220. Now can you recall any more specifically than you did this morning what was said in the letter from Paul & Paul to you in which you say he stated what claims or patents owned by either the Owatonna Mafg. Co. or Creamery Package Mafg. Co. were infringed by the Owatonna churn.

A. I do not think I can.

Q221. Was it stated in that letter that the patents infringed by the Owatonna churn were those belonging to the Owatonna Mufg. Co?

A. I think it was, or at least by their clients.

Q222. Did they use the word "clients?"

A. It is my recollection that their letter stated that they were writing for their clients and that they had charge of this suit for infringement.

Q223. Who did they say were their clients?

A. I believe they named the Owatonna Mnfg. Co. but I am not sure that they named the Creamery Package Co.

### RE-DIRECT EXAMINATION OF MR. LADD,

(Examined by Mr. Leach.)

Q6. Have you ever tried to buy any repairs or churns or other creamery supplies of the Creamery Package Mnfg. Co?

Mr. Coben: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Yes sir.

Q7. Have you been able to make such porchases?

Mr. Cohen: That is objected to as intrasterial and irrelevant Objection overruled. Defendants except.

A. No sir.

Q8. State what experience you have had, or your company has had in trying to buy extras or repairs, of the Creamery Package Murig. Co.

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled: Defendants except.

A. We have tried to buy them-

Q9. I mean of his own knowledge.

A. As I have been in active management of my concern since its beginning, I am in a position to state from my personal knowledge, and will say that sometime ago we sent an order to the Creamery Package Co. for churn repairs for one of our customers, the Hemlock Creamery, Hemlock, Michigan, and we received replies from the Creamery Package Co. stating that they could not furnish us with these repairs.

Q10. Did you get the repairs of the Creamery Puckage Mnfg. Co?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. No sir.

Q11. Does the Creamery Package Mnfg. Co. handle the DeL valle separator?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. I believe they are general agents.

Q12. Does the Creamery Package Mnfg. Co. sell that separator direct to users?

Mr. Cohen. Objected to as immaterial and irrelevant. I do not see how these questions about the separator are material, but I will waive the objection.

A. Yes sir.

Q13. Are you able to buy that separator of the Creamery Package Mnig. Co?

A. I have never tried it.

Q45. You said that you sold the Number 6 Owatonia chura for about \$185.00, in your answer to question 156 on cross examination.

A. That was my recollection. I may have had the price high.

Mr. Cohen. There is now some more cross examination, but we will not offer it.

Mr. Williamson: We will begin with question of The first a sections and not offered by us. (Mr.: Williamson reads cross examination as follows:) On When was 4 that you attempted to buy certain repairs from he Creamery Pastage Mintg. Co. concerning which you have testi-ted on re-direct examination?

L believe it was some time last summer.

t is the summer of 10087 A. Yes.

Quit. How was that transaction conducted? A. By mail.
Qua. That is you wrote a letter, personally, did you?

A. I sent an order personally.

Ory. Did you receive a reply to that order? A. Yes sir.

Q14. Where is that reply? A. I believe it is in my files.
Q22. Do you know where the DeLavelle separator is made?

i believe at Poughkeepsie, N. Y.

Do rou of your own knowledge know for what territory the Creamory Package Maig. Co. are agents for the DeLavelle separa-

A No Sit

Oas. All you know is that they are agents for that separator, at neago? A They advertise as being general agenti-

s. But the extent of their territory you do not know of your

From what other customers or proposed purchasers of the ea churn did you personally receive complaints of the fact that they had received letters from the Creamery Package Mnfg. na Minfig. Co. or their attorneys or agents in regard Cover the Ordina to the Owatoms churs? I want you to exclude statements made to you by your agents, traveling men, or complaints coming to by way

A 1 do not remember of any.

### RE-DIRECT EXAMINATION OF MR. LADD

Read by Mr. Williamson

Q). How man, of the 400 treameries located in the Lowempouls of Michigan are and have been visited by your traveling

I should think on per own. I believe I answered that this

### RE-CROSS EXAMINATION OF MR. LADD.

A LAND IN VINE

Ot. As it Catestand you can to be understood that your travely salesmen reported to you that they had visited that number of ale se crite

A. My traveling salesme

Q2. Please a names that by yea or no.

A. I want to explain, they gave me a daily report.

Q1. When or not your traveling salesmen visited go per cent of the creameries in the Southern Pennisule of Michigan you gave no information except as they reported such fact to you? Please inswer by yes or no.

A No sir

### RE-DIRECT EXAMINATION OF MR. LADD.

Read by Mr. Williamson.

Q1. Were those daily reports made by your traveling men to you ade by letter?

A. In most cases, yes.

Were you able to ascertain in those cases, from where the letter came, by the postoffice stamp on the letter?

A. In most cases, yes.

Qt. What was the name of the make of the machine for which you say you wrote last year to the Creamery Package Mnfg. Co. for repairs, and which request you say they refused to fill?

A The Disbrow churn.

Mr. Reigard. Plaintiffs and each of them now offer in evidence and read the depositions of W. H. Monroe taken before a legally authorzed commissioner. April 23, 1000.

W. H. MONROE, being first duly sworn, testified as follows:

Examined by Mr. Leach.

Qt. Where do you live, Mr. Monroe?

A. Sioux Falls, South Dakota.

How long have you lived there? A. About six years.

What has been your business at Sioux Falls during the ix years?

A. I have been in the employ of the J. G. Cherry Company most of the time,

04. When did your employment by that company begin?

A. It begun November 1903.

Os And continued how long? A. Until December 1908.

Q6. Where was the main place of business during that time of

J. G. Charry & Company?
A. Cotton Rapida, Town.
Qy. Did that company also have a branch house or place of business at Sionx Palls, South Dakots?

A. They did.

Q8. What was the character of the business thering that period of J. G. Cherry Company?

A. General creamery supply line.

Q9. Did the J. G. Cherry Company, which I will call the Cherry Company for short, during that period, or a past of that period, sell the combined churns and butter workers manufactured by the Owa-tonna Fanning Mill Company at Owatonna?

A. They did.

Mr. Reigard. I will state for the understanding of the jury that the churn referred to in the question and answer just above is a churn manufactured by the Owatoum Fanning Mill Company, one of the plaintiffs in this action, the other plaintiff being D. E. Virue.

Quo. About when did the Cherry Company begin to sell those

A. In the spring of 1904, I believe

Qts. And they continued selling those churns for how long?

A. Oh, just a short time. I would say not over six months.

Qts. Did you have anything to do yourself with the sale of those churns for the Cherry Company?

A I did.

913. Did you travel around the country trying to make those sales? ger of the branch at Sioux Falls, I usually went my-

self on the charn deal.

Q14. During this time you were at work for the Cherry Company, were you their manager at Sionx Falls?

QIS. Were you the head man there and the man who had general charge at that place of the business of Cherry Company?

Q16. In what territory did you tenzel while trying to sell and in aking sales of the churn made by the Owateness Fanning Mill Com-

South Dakots, Northwestern Iows, Southwestern Mineratts

Over When you made sales of those churns, Were the churns thought direct to the customer or sidether go has to some other place?

A. They went direct to the customer from Constants.

Only What were received a lorder to the colorest to the colore

A. I usually sent it first to the Cherry Company at Cedar Rapids only in cases where the customer was in too much of a hurry to wait for it to go around that way. In such cases I sees them direct to the Owntowns Ranning Mill Company.

Q19 And after those orders had been thus sent by you, did churn go from Owatonua to the purchaser in a short time?

A. They did.

O20 Can you now tell how many charm were sold and shapped in that way?

A. I can't tell just how many.

O21. Tell us how many you know were so ordered and shipped?

A. I can't tell you exactly.

Q22. Give us the names of places to which you can now remember

churns were to sent?

A. I call to mind the Coon River Creamery Company at Newell, Iows, and Weidrich & Permann at Tripp, South Dakota. I believe the Marshall, Semborn Creamery Company at Huron, South Dalecta, not one of the churns. I think that is all I can remember.

Qay. At what time about was a churn sent to the Coon River

Creamery Company in the state of lowa?

A. I think it was shipped in the latter part of May, 1904.

Q24. After the churn had been shipped to that place, did you go there to see about it?

A. I did.

Q25. What was the occasion of your doing that?

A. The Coon River Creamery Company wrote a letter to the J. G. Cherry Company at Cedar Rapids which the Cherry Company sent to me, which called me there.

026. After you arrived there did you proceed to the creamery of

the Coon River Company?

A. I did.

O27. Did you there see one of the Virtue or Owatowns Panning

Oas. Was that churn set up in the creamery and in operation there?

A. Yes, sir. They were churring with a when I got the

Oso. And that creamery was in the state of lone, was he

A. Yes, siz,

One. Did you see anybody there at that time or as that trip rep-centing the Creemery Package Mfg. Company? A. Men, Air. I saw Issue Woodring.

Ohn. Who was Book Woods ag and other was bit business?

A. He said be yet compleyed by the Creamery Package Mily. Co.

Dag. How long had you known him?

A. It was the first time I met him.

O23. Did you learn that he was there before you arrived at the Creamery?
A. Yes, sir.

O34. You may tell what took place at that creamery between yourself, Mr. Woodring and the Creamery Company?

Mr. Cohen. That is objected to as immaterial and irrelevant; there is no evidence to show that Mr. Woodring represented the Creamery Package Manufacturing Company, except his own statement.

The Court. I will sustain the objection.

Mr. Leach. We may have some testimony here to show that he was representing the Creamery Package Manufacturing Company. We can prove it later, but not now.

The Court. I will sustain the objection for the present.

Mr. Cohen. If the evidence is not admissible it is only for lack of proof of authority, but I find in another deposition a statement which shows that Mr. Woodring was an ordinary salesman, and we claim that this is not sufficient to bind the company by any statement made by him.

The Court. I will overrule the objection.

Counsel for defendants except to the roling.

Mr. Leach. Then you admit that Woodring was in the employ of the Creamery Package Manufacturing Company as a traveling salesman?

Mr. Cohen. Yes, but I do not waive the point that there is no evidence of his authority. I will say that for the purposes of the deposition that is now being read we will concede that Isaac Woodring at the time referred to by Mr. Monroe, was a traveling salesman in the employ of the Creamery Package Manufacturing Com-pany, and then I will make my objection that the evidence is imma-terial and irrelevant because of lack of authority on his part to bind the Creamery Package Mfg. Co. by his statement.

The Court. I will overrule the objection.

Counsel for defendants excepts to the ruling.

A. Well, the meeting was called and when we started to go up into the upper story of the creamery building. Mr. Woodring asked if he could go into the meeting. He was told by the secretary that it was Monroe's meeting and that if I did not object he had no objection. It burned to Mr. Woodring and faid "Come and go up" and he west.

Q35. That was a meeting of what?

A. The heard of directors of the Coon River Creamery Company: Q36. And the secretary you have mentioned was the secretary of hat board?

A. He was

Q37. Tell what took place at that meeting.

Mr. Cohen. That is objected to as immaterial and irrelevant, and in the further ground that there is no showing of any authority on the part of Woodring, so that his act or statement would bind or se evidence against the Creumery Package Manufacturing Company.

The Court. I will admit the evidence as to what Mr. Woodring and at that meeting. What took place at that meeting is perhaps not admissable.

Mr. Reigard. Except as it may bear upon the statements of Mr. Woodring.

A. The president of the board stated that they had called a meetag for the purpose of condemning the churn and asked me if I had nything to say. I told him I thought I would have somewhat to ay. But before we proceeded I wanted the buttermaker called into he meeting. They said he was too busy and I said we would not proceed until he found time to come if it took a week. Then they alled him up. I asked him a few questions. First-what was your werrun with the Disbrow churn? He said he did not know, I asked he secretary. He said he did not know. I demanded that he get he books and find out, which he did. And we found it to average ess than six per cent for the year previous to the installing of this ew churn. I asked what the overrun had been for the months they and used the new churn and they told me thirteen. Then I asked on that ground do you condemn the churn? Then Mr. Woodring took he floor, or tried to. I asked for the appointment of a moderator and I was appointed. I asked Mr. Woodring to keep still while had the floor. He insisted that he would not. I made the third lemand and he did after that,

Q38. What further occurred at that meeting?

Mr. Cohen. I make the same objection that I did to the last ques-

Objection overruled. Defendants except.

A. I made them a proposition that I would select a man and they elect one to work with their butter maker and test the overrun each huming and that if the new churn did not turn out as clean as any hum on the market, that we would take it out. While they were iscussing this question, Mr. Woodring stated that this delay was noccessary as he knew what was the matter with the churn, that

he had made churs's and that these farmers know nothing about a Churc and he was not going to see them both out of their money and that if would only cause him to make another crip tank there to take an-order for Disbrow. He also stated that the Creamery Puckage ad or were about to institute proceedings against the Owstenna Fantime Mill Company for infringing on the Disbrow patents and that if hey, (the farmers Creamery Company) used this churn, they would be sued for infringement. And I agreed to bind my company in the such of Ten Thousand Dollars to indemnify them against any loss through infringement suits that might be brought by the Creamery Package Company. And they voted to test the churn further.

Oao. Was all this conversation which you have narrated as taking place at that meeting in the presence and hearing of Mr. Woodring?

L. It was

Q40. When Mr. Woodring said, in substance, that the creamery, Company was to be sued for infringement if they used the churn of the Owatonna Fanning Mill Company, did Mr. Woodring specify the patent or the names of the patent on which the Creamery Company would be sued?

Q41. For infringing what patents, if any, did Mr. Woodring say that company would be sued if they used the Owatonna Fanning Mill charn?

Mr. Cohen. There is no answer to that.

O42 State what Mr. Woodring said.

Mr. Cohen To all this I make the same objection:

Objection overraled. Defendants except.

A. He said they were infringements on the Disbrow patent.

Q43 What was an infringement of the Disbrow patent if he

A. The churn manufactured by the Owatonna Fanning Mill

Q44. Can you remember whether Mr. Woodring said that the Owatonna Fanning Mill Company had been sued for such infringement or would be sued for infringement at that time?

Mr. Cohen. All this evidence is subject to my objection and ex-

A Control of

of Actes much on he had instructions that A measurable which just at this time.

A. I remember, it was either the 3rd or 5th of July, 100s.

O46. Can you remen mber anything else that took place on your

A It seemed that there was quite a little excitement and exectancy among the inhabitants of the town looking forward to the crap that he was going to pull off with me at that time.

047. How long did you stay at that creamery on that trip?

A. I left there on the early morning train.

O48. When you left, was the Owatours Fanning Mill churn still in the creamery?

A. It was.

Q40. When Mr. Woodring stated that the company would be med if they used this churn, who was present?

A. The full creamery board, Mr. Woodring and myself.

Oso: How many composing the board?

A. I think it was five, it may have been seven, I don't remember.

Ost. After that you continued to try to sell the same churn until about 1905?

A. No, I didn't push the churn any more after that,

O52. Will you state the reason why you did not?

Mr. Cohen. That is objected to as calling for a mere state of mind of the witness.

Objection overruled. Defendants except.

A, I didn't want to be bothered with that kind of fight. I t another churn to handle.

Oss. Why did you change from selling the churu made by the Owatonna Fanning Mill Company to some other churn? Give your reasons in full.

Mr. Cohen. I object to that because it calls for the state of mind the witness and is immaterial and irrelevant.

Objection overruled. Defendants except.

A. Well, I did it principally because I deemed it more than the urn was worth to keep it in the creamery after I got it there and in I got hold of a churn that I liked fully as well without having hat trouble

Osa. Why was it difficult to keep the Owatoma Panning Mill um in a creamery after you got it there!

Mr. Cohen. We object to this on the ground that it it leads nd also on the ground stated in the objections to the last question. he answer seems to be not responsive.

Objection outsided. Defendants except.

A Become investigation hid down on.

Q55. What did they do or say?

Mr. Cohen. We object to it because it calls for a statement of what the competitors did and said. It does not call for any specific set or statement, and is immaterial and irrelevant in any event.

Objection overruled. Defendants except.

A. They always threatened my prospective customers with a lawsuit for infringement of the Disbrow patent.

Q56: What was the effect of that on your business?

Mr. Cohen. That is objected to as immaterial and irrelevant, and as calling for a conclusion of the witness.

Objection overruled. Defendants except.

A. It usually scared them so they would not talk churn to me.

My. Cohen. I move to strike out the answer on the same ground thus stated, and because it is not responsive to the question.

The Court denies the motion and counsel for defendants excepts to the ruling.

Q57. About what time, as near as you can tell, did you in your trade first run across those objections on the part of the prospective purchasers of threatened lawsuits?

Mr. Cohen. I don't believe that was answered.

Qs8. State whether or not you know if it was or was not a matter of common knowledge and talk among the prospective purchasers of churns in your territory that such intringement suits against the Owatonas Fanning Mill Company and purchasers of its churns would be commenced?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. I do know.

Q50. Was it or was it not?

Mr. Cohen. That is objected to as calling for hearsay evidence and as immaterial and irrelevant.

Objection overruled. Defendants except.

A. It was

Que. What effect did that talk of infringement suits against customers have on your trade of selling the churus and butter workers made by the Owatouna Faming Mill Company in that territory?

4. It usually had the effect to scare them out of the notion, if they

had such notion.

Q61. While you were manager at Sioux Falls, alid you receive a ball from My C. F. Cropper from Managapulis?

A. Yes, he called on me frequently.

Q62. Was he the manager of the Creamery Package Company Minneapolis then?

A. Yes, sir, he was.

Q63. Did you ever have any talk with Mr. Cooper in regard to intering into a contract or making any agreement on territory?

A. Yes, sir.

Q64. What was that talk?

A. He said that he was going to make us a proposition.

Q65. Tell the whole of the conversation.

Mr. Cohen. That is objected to as immaterial and irrelevant and as not having any bearing upon anything we are trying here.

Objection overruled. Defendants except.

A. I asked him what it was and he said that if we would take our house out of Sioux Falls that they would theirs and let the creamery man ship their supplies from Minneaplis and Cedar Rapids. He said that they would not bother us on the egg case and filler business and we could have what we could get of the creamery supply busness. But I told him that I would be a fool to put up a proposition like that to my house as it would cut off my head as manager of the Sioux Falls business. He said that I need not worry about that, as one of them would take care of me. I believe that's all.

Q66. What, if anything, did Mr. Cooper say about who owned the creamery supply business?

me creamery suppay pusiness?

A. I do not think that he said anything as to who owned the business.

Cross-Examination read by Mr. Cohen.

XQ67. Do you know how long the house of J. G. Cherry Company has been in existence?

A. About eight years under its present organization.

KQ68. Before its present organization the house did business under the name of J. G. Cherry & Company, did it not?

A. I think it was J. G. Cherry, I don't know.

XQ69. Can you tell how long the house of J. G. Cherry did bus-

A. About thirty or thirty-five years,

XQ70. At the time that the Cherry Company began to sell the Owatouna Fanning Mill churn, did that company handle another thurn?

A. They did not.

KQyt. Did the Cherry Company at that time before the spring 1904, when the handling by it of the Owatonna Fanning Mill

Company thurn began handle say other shore?

A. I think possibly they had sold a few is easiler days. call it the Cherry Company) began in November 1903, did it?

A. Yes, sir. XO73. Before that thre sometime toward the end of 1903 you had not been employed by the Cherry Company?

A. No. sir.

KO74. Or by any presecessor of that company? A. No, sir. XO75. So far as the business of the Cherry Company is conoccured, you can speak from your own knowledge only from the end

A. Yes, sir.

1076. Referring now to the churn of the Owatonna Fanning Mill make at the Coon River Oreamery, it is true that a Disbrow churn was discarded in order to install an Owntonna Fanning Mill

A. It was disearded because it was worn out.

XQ77. The Disbrow being worn out, the Coon River creamery turned its attention to getting another churn and finally had installed the Owatonna Faming Mill churs?

A Yes sit.

KO78. Was the Creamery Package Company in competition with the Cherry Company for that new churn for the Coon River

A. There was no one present at the meeting.

XO79. You refer now to the meeting where you got the order for that churn?

A. Yes, sir.

XOSo. You don't know then whether you got your order in competition over the Creamery Package or not do you?

A. No. sir.

XOS: In stating what occurred at the meeting at Coon River in July, 1904, you used the word "they" in speaking about your nd for the buttermaker. Do you mean to include in the word the Mr. Wooding?

A STATE OF

in questions 37 and 38, which I now ask you to read, which are appropriate of these questions; do you say that where used the word "nitey" the word referred to the officers of River Countery, encluding Mr. Woodring?

Carolin III. Wanting

XQ83. You say that effecting in July 1904 you were moderator. Do you mean that you presided at the unset

A No si

XQ84. Do you mean that you used force as compel Woodsing to emain quiet?

A. I did not

XOB5. What did you do at that meeting as moderator?

A. I asked Mr. Woodring to keep still while I was talking. XQ86. And that was all you did as moderator?

A. I went over to him and exhorted him to keep still.

XQ87. Did you make any display of force to Mr. Woodring?

A. No it was not necessary to go that far, quite.

XO88. But on your third demand. Woodring remained unjet?

A. Yes sir.

XQ80. Before that meeting, in July 1904, had you heard from any ource that the Creamery Package Company had begun or was about to begin litigation for infringement of patents against the Owatonne Fanning Mill Company? A. Yes, sir, I had.

XQoo. How long before? A. I don't remember.

XOOL. Was it a matter of months or weeks?

A. It must have been some months.

XQq2. Did you after that meeting in July 1904 learn from any source that a suit for infringement had in fact been brought by the Creamery Package Manufacturing Company against the Owatonna Fanning Mill Company? A. Yes, sir.

XOos. Can you fix the time? A. I cannot.

XQ04. Can you give us approximately how long that was after the meeting in July 1904? A. I don't remember.

XQ95. Did the Cherry Company begin selling another churn through the place of business of which you were manager; in 1904?

A. Yes sir.

XQ06. What churn was that? A. The Simplex.

XOoy. Was the Simplex a combined churn and butter worker?

A. Yes sir.

XOo8. Can you state in what month in 1904 you began the sale if the Simplex for the Cherry Company? A. I could not,

XQ19. Are you able to place it within a month or two?

A. Not without reference to the books. XQsoc: Where are the books?

A. They are in the possession of the J. G. Cherry Company T

XQ101. Was it before or after the meeting in July, 1954, that you can salling the Simplex for the Cherry Company?

Character And you ever another to atten have line after annually ring to the leader? A. I am Corollary From the time your began selling the Simplest for the Character, you communal selling that characterist you left the engage of the company, did you not? A. I did

20104. In what states were your sales of the Simples ? A. Minnesota, Iowa, North and South Dakota.

A. Minnesota, towa, prorts and Sound

\*\*Cong. Did you meet with any threats of infringement suits be

\*\*Creamery Package Company in your sales of the Simplex?

\*\*A. No sir.

Orofo. The operation of the Simplex differs considerably from coperation aither of the Distroy or the Victor, does it not?

Qioy. The Simplex is a practical and successful machine, is

 A. Yes uir.
 XQros. Can you tell us how many machines of the Simplex style he sold while you were conducting the business of the Cherry Com-

KQrog. As you able to say how many machines of the Simplex yie have been sold by the Cherry Company altogether during the triod of your employment by that company? A. I am not KQro. By whom was and is the Simplex churn made? A. D. H. Burrell & Company, of Little Falls, New York.

XQ111. Can you state whether or not the number of machines of the Shaples style is use is large?

L. It is getting to be large, yes.

FORES. Can you state the whole number of Simplex machines now in use a the United States? A. I cannot, exactly, XQV93. Can you state it approximately?

A. I would judge about twenty-five hundred.

XQ114. What is your present employment?

A. I am not employed at present

KQ115. Have you had any employment since you left the employ
of the Cherry Company?

A. I tried to organize a company myself.

KQ216. And that perhaps is your present occupation, it it?

COTES In anying then that you did bedoes in the four states.

used you don't make that you that b

This is to be stated?

A No. sir. Only in the territory adjacent (a Siron Palle, S. D. XQ ray. Can you distribute approximately those two hundred and by creameries that you spoke of as being in the secritory in which is operated—I mean distribute by states?

A . I could not. I take it by the number of accounts about the umber of accoun

XO120. Do you include all the accounts, or only the creamery acsints? A. The creamery account

XQ121. You have spoken of one occasion in July 1904, when foodring, at the meeting at Coon River mentioned the infringement mit. Can you state any other occasion when anybody claiming to epresent the Creamery Package Mfg. Company spoke of that suit. er as already begun or about to be begun? A. Yes sir.

XO122 What was the other occasion?

It was to Weidrich & Permann, at Teipp, S. D.

XO121 When was that?

A. That was during the winter of 1903 and 4. I think in February esibly, 1904, before this other occurrence

XQ126. When was it that Weidrich & Permann told you in reand to the statement you refer to as having been made by Emil Neraughen? A. It was during the winter of 1903 and 4.

XQ197. Was it before or after you sold one of the Owatonna Fanng Mill machines to Weidrich & Permann?

A. It was before and at the same time.

XO128. Weidrich & Permann told you of Nerhaughen's statenent and afterwards you completed a sale of an Owatonna Fanning Gill machine to Weidrich & Permann. Is that correct?

A. After guaranteeing to indemnify them against any loss of that ture I made the sale

XQ139. That was the same guaranty that you promised in the con River case, was it not? A. Same kind of a guaranty, yes.

XQ130. And the Cherry Company in fact gave a guaranty of that and in each of those two instances, did it not?

A , I had full authority to bind them in a guaranty and did

XQ131. You have said that you began selling the Owatona Parinin fill machines in the spring of 1904. What do you mean by the ring of 1904?

A. Well, it was the winter of 1903 and a and on thinking the force I find that I sold two churns during that west

KQ132. Two churns other than the three that you have mentioned your testimony? A. No, sir KQ132. Now then, as to the time of the sales of the three churns

you have mentioned will you con thate your best I collection

Chic In the contract of the co it yes to

Her. Patents as (the core chia

ACCES. When were it precisely that Mr. Weathing said as the object of that precises:

All rold that precises:

All rold that receivery board that this entern was an intrinsicular on patents owned by the Greathery bricking Mr. Contracts that that if they need the chart they would be used to infringement KQ148. Did not youvelf table the conjected with an intrinsical Contract Mr. Company were setting the Simplest machine A. We had no contract for a year to two have a not the chart is care or two latters the Contract Rolds office took and a few males of year or two latters the Contract Rolds office took and a few males of the chart is care to two latters and the males of the contract for a year to two latters and the males of the contract for a year to the contract latter than the chart is the contract for a year to two latters and the males of the contract latter than the chart is the contract latter than the chart is the contract latter than the chart is the chart in the chart is the chart in the chart is the chart in the chart in the chart in the chart is the chart in the chart in the chart in the chart is the chart in the chart in

hine to your incivisely, more take use as the territory configuration. The state of the s

A No had good in season through the Steamer Jesting and

KOrgo: You can't scale then whether or not machines of that ake were then in use in that territory configurous to Stone Falls?

A. They were not in use in that territory

XQ151. Din you know of their being in one is other territories?

A Not to my personal knowledge.

NO150. The Stoplex succions differed in structure, did it not, fragate machine made by the Owntowns. Panning Mill Company?

As It differed widely in construction

XQ153. And I think you have already said that it differed in one struction from the Victor and Dishrow (10)? At I did.

SQ154. What was the difference it construction between the Sim-st and the other machines I have named in regard to the translet. lattie from the court fire the force sorting process the com-

The butter from the Simples chord was taken out in a tray a rested on the worker truck while in the other makes of charge

en taken out with a goods or ladie XQ155 - in the Simplex & part of a a part of the cylinder bear is to se leaves to made, is it not, and that permits the one of the

The batter (various considerest factor will) to see without 170. To be the considerest thousand the Country Problem 18

born guarantee against any infringement suit by the Creamery Pack

age Mig. Company?

A. I don't think it came up in Koch Bros. sale. If I remember right the Marshall & Sanborn Creamery Company said they weren't afraid of it.

XQ161. Are you able to say from your memory whether at the time that the Marshall Sanborn sale was under discussion, the Creamery Package suit against the Owatonna Fanning Mill Company was begun?

A. Oh yes, some time before that.

XQ162. Are you able to say whether it was generally known in the creamery business early in 1905 that an infringement suit by the Creamery Package Company was pending against the Owatonna Fanning Mill Company? A. Yes sir.

XQ163. Have you in mind the month or approximately the month and year in which you first began to solicit business for the Simplex?

A. No, I have not.

XQ164. It was after July 1904, was it not?

A. Sometime after that.

XQ167. Do you mean that you did not get any information on that subject either from Virtue or the Owatonna Fanning Mill Company?

A. That is exactly what I mean.

XQ168. What representative of the Creamery Package Mfg. Company told you about that suit?

A. Mr. Woo ring I think is the first man that made that statement, XQ169. The statement by Mr. Woodring is the statement that you have already testified to here, is it not? A. Yes, sir.

XQ170. Woodring did not state, did he, that the suit had already

been begun? A. I do not think he did at that time.

XQ171. From what other representative of the Creamery Package Mfg. Company did you receive any information as to the suit having already been commenced?

A. Emil Nerhaughen told me about the time that the suit was

institute 1.

XQ172. That the suit was commenced, did he tell you that?

A. Yes.

XQ173. Can you fix the time when Nerhaughen told you that?

A. I cannot.

XQ174 Not even approximately? A. No.

XQ175. Did you learn of the commencement of that suit from any other representative of the Creamery Package Mfg. Company?

A. I think Mr. Cooper spoke to me about it.

A. No, sir. I was not interested, and I didn't care about it.

XQ177. It was generally known, was it not, in the creamery business

ness early in 1905, that such an infringement suit had been commenced?

A. I think it was generally known that it was commenced or would be.

XQ178. I am speaking now of 1905.

A. I understand, but I don't know whether that suit was commenced in 1905 or 1904.

XQ184. Are you able to separate in your men ory rumors and talk in the trade that the suit had been commenced from rumors and talk in the trade that the suit was about to be commenced?

A. No, I can't. I paid very little attention to rumors.

XQ185. Did you pay any particular attention to the rumors that infringement suits would be commenced?

A. Not after I quit selling the churn. I was not interested.

XQ186. Do you fix the time when you quit selling the churn?

A. I fix the time when I quit pushing it.

XQ187. And what is the time? A. July, 1904.

XQ188. What you mean is that after July 1904 you paid no particular attention to the rumors or talk in the trade, is that right?

A. Yes, that is right.

XQ189. And you are unable to say whether before you quit pushing the Fanning Mill churn the rumors were that a suit had been begun?

A. I have testified that the rumors had been begun.

XQ190. Have you testified that before you quit pushing the churn rumors that a suit had been brought had come to your attention?

A. No sir. The rumors were that the suit had been brought or would be brought.

XQ191. And those were the rumors and common talk before you quit pushing the Fanning Mill churn? A. Yes sir.

XQ192. As to the time when you quit pushing it, you wouldn't be able to say the month of 1904 further than to say that it was after that meeting in July at Coon River, would you?

A. That is the last churn I had tried to sell of that make. I would state that I was always willing to sell the churn if I was called on.

XQ193. And I understand that you did in fact sell a churn to the Marshall Sanborn Creamery Company sometime in 1905?

A. I don't remember if it was 1905, it may have been 1906. It was after this creamery deal.

XQ195. Are you here on subpoena? A. By request,

XQ196. By whose request? A. D. E. Virtue's.

XQ197. Do you come here to give your testimony from Sioux Falls, S. D.?

A. I have other business in the city, and arranged to do it while here.

XQ198. Had D. E. Virtue promised to pay your expenses or give

you any other compensation?

A. I have had no talk with him in regard to it.

XQ199. Have you had any promise from or talk with any other person in regard to your compensation or expenses?

A. I have not.

XO200. You have been in attendance here during two days? A. Yesterday and today.

Re-direct examination by Mr. Leach, read by Mr. Reigard.

RDQ201. You have mentioned the tetritory in which you sold charms beginning in the year 1904. At the time you began to sell charms in that territory, what were the churns which were in use in creameries in that territory?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Objection oversuled. Defendants except.

A. The Disbrow and the Victor.

RDO202. About in what proportion?

A. I would say one hundred per cent.

RDO204. About what part Disbrows and what part Victors?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Well, just from a guess I would say seventy-five Disbrows and twenty-five per cent. Victors.

RDO205. In how much of the territory worked by you or over which you had charge that you have mentioned was that true?

A. Well, the territory contiguous to Sioux Pails.

RDQ206. In what states?

A. South Dakota, Minnesotti and Iowa.

RDO207. About how many creameries were then located in that territory? A, I should judge about one hundred fifty.

RDO208. Dill you put up my bond to protect against infringement suits for any other creamery company than you have mentioned?

A. We did not put up bonds. We only did it by letter.

RDQ209. In how many instances altogether?

A. I should judge only two where deals were consummated.

RDQ210. And what was the amount of indemnity in those two cases?

A. We offered to cover their losses.

RDQ222. Was that regardless of amount or any particular sum?

A. Regardless of amount, for we never considered that the Cream-Package Mfg. Company would sue a mer of the charn. RDQ412. Where did you first see or hear of the Samplex churn?

A. I saw if in the Creamery Pricings Company catalogue.

RDQptg. Was that a catalogue in your possession?

A. Yes sir. I always carried one.

RDQ214. And that was in about what year?

A. It was in 1904 or 1905, I don't remember, but the catalogue was of older date.

RDQ213. Where was that Simplex churn made and sold from?

A. Little Falls, New York.

RDQ216. Manufactured by what concern?

A. D. H. Burrell & Company.

RDQ217. Did the Simplex churn then have the two speed arrangement?

Mr. Cohen. That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except:

A. Yes sir.

RDQ218. Was the Dairy Queen churn ever sold in your territory that you know anything about during the years that you were with Cherry Company? A. They were not.

RDQ219. You have spoken about rumors that you heard in regard to an infringement suit against the Owatonna Fanning Mill Company. In connection with those rumors, what patents, if any, were mentioned as being infringed by the Owatonna Fanning Mill Company?

Mr. Cohen. That is objected to because it has been gone over once or twice before, and also because it calls for mere rumors.

Objection overruled. Defendants except.

A. The Disbrow patents.

RDQ220. State how general that rumor of the Disbrow patents being infringed was used in connection with the rumors of the infringement suit.

Mr. Cohen. That is objected to because it has been gone over once or twice before, and also because it calls for mere rumors.

Objection overruled. Defendants except.

A. I don't know that I could separate the rumors that the suit was being instituted for infringement on the Disbrow patents from a general rumor that the patents belonging to the Creamery Package Company was being infringed.

Recross examination read by Mr. Cohen.

RXQ221. You don't know of any other machines than the Disbrow and Victor that were in use in the territory tributary to Sioux Falls, 40 you? A. I don't call to mind any.

RXQ222. There may have been some?

A. There may have been one of two, but not to exceed that.

RKQ225. Are you able to say of your own knowledge whether in that territory at that time there were 450 churus in use?

A. That was a guess. EXQ224. And that is the best guess you can make is it?

A. That is the only one I will make.

RXO225. You were asked whether at the time you began selling e Simplex is had the two speed arrangement. You answered "Yes." What do you mean by the two speed arrangement?

A: There is one speed for working and one speed for churning.

RXQ226. And how were those different speeds produced?

A. By an arrangement of levers and pinion gears.

RXQ227. Are you able to say whether the device for producing two ats under which that churn was made or are you not familiar with the

A. I am not familiar with the patents at all.

RXQ228. In testifying on redirect examination, you spoke of rumors as to the institution of suits and as to the patents that were mentioned in those rumors. Have you's distinct recollection of rumors distinctly mentioning the Disbrow as distinguished from patents in general belonging to the Creamery Package Company?

A. I am not able to separate rumors as to whether the suits were being brought for infringement of Disbrow patents or patents that be-

longed to the Creamery Package Company.

Redirect examination by Mr. Leach

RDQ229. In connection with the rumor that infringement suits were or would be brought and that the Disbrow patents were being infringed, was there any rumor as to who or what company owned or controlled the Disbrow patents?

A. The rumors were that the Creamery Package Mfg. Company would bring or had brought the suit for infringement of patents that belonged to them.

RDQ230. Have your examined your testimony during the noon re-

A. One correction.

RDQ231. Please make it.

A. In answer to XQ147 I stated that he Mr. Woodring, told this reamery board that this churn was an infringement on patents owned of the Creamery Package Mfg. Company and that if they used the turn they would be sued for infringement. I wish to make the answer ead "He Mr. Woodring, sold this creamery board that this churn as an infringement on the Disbrow patents owned by the Creamery chage Mrg. Company and that If they used this churn, they would be sucd for infringement.

RDQ232. Is there any other convertion you wish to make?

A. That is all.

Recross examination

RXQ233. Did you have any conversation with Mr. Virtue of a his autorneys in regard to this correction?

A. I did not, only I told them I wanted to make this correction

RXO234 Neither of them called that correction to your attention?

A. No sir, I took it to read it over myself.

RXQ235. The use of the word "Disbrow" by Mr. Woodring is entirely clear in your memory after the lapse of all those five years, it it? A. It is

RXO236. Is it also clear in your memory that Mr. Woodring used the phrase "owned by the Creamery Package Mfg. Company"?

A. Yes sir.

RXQ237. Is it clear also in your memory that Woodring said at that time that the Creamery Package Mfg. Company had instituted or were about to institute proceedings against the Owatonna Fanning Mill-Company? A. It is,

RXO238. Do you remember whether in the letter of guaranty that you wrote for the Coon River Creamery Company you mentioned specifically the Disbrow patents?

A. The letter was guaranteeing them against law suits brought by the Creamery Package Company for infringement on the Owatonna

RXO239. Without specifying the Disbrow patents? A. Yes sir. RXQ240. In your direct examination you spoke about a talk that ou had with Mr. Cooper in which as you testified he made you a proposition. You did not state the date of that talk. Can you state it now?

A. No sir.

RXQ241. Can you give an approximate date from the best of your memory? A. I think it was in the winter of 1906 and 7.

Mr. Reigard. We now offer in evidence on behalf of the plaintiff and read the deposition of Frank B. Fargo, taken May 10, 1900.

MR. FRANK B. FARGO, sworn, testifies as follows:-

Direct examination by Mr. Leach.

Q. Mr. Fargo, you live at Lake Mills? A. Yes.

State of Wisconsin? A. Yes

And you formerly were connected with the F. B. Fargo & Co.

that place, were you?

And were you a director and officer of the F. B. Pargo & Co. the 24th day of February, 1898?

What office did you then hold, Mr. Fargo, besides being a every at that time, Mr. Pargo?

Don't resollect exactly, but I think I was vice president.

Some remember that contract being executed by the F. B.

190 & Co., 60, 100 not,—the contract of February 24, 1898?

What contract do you refer to?

Thee contract of February 44, 1898, between the Fargo Com-and the Creamery Package Manufacturing Co. and the Cornish, deriis & Greene Mig. Co. A. Venzir.

Do you remember what patents were held and owned by the These parents that I hold I think were the patents that we would state time.

Of I suppose that question should be answered yes or no.

Of You do remember them, do you, Mr. Fargo? A. Yes.

Of I show you patent No. 539,571 issued May 21, 1895, to F. B.

Fargo & Co. as assignes of Charles S. Brown of Lake Mills and ask you if that is one of the patents which was owned and held by the P. B. Forgo & Co. of Lake Mills just prior to said at the time of the execution of that contract of February 24, 1898? A. It is.

Q. And I slow you patent No. 565,720, issued on August 11, 1856, to F. B. Fargo & Co. of Lake Mills, Wisconsin, as assignee

of Charles S. Brown of Lake Mills, Wisconsin.

I also show you patent No. 500,168, issued March 8, 1898, to F. B. Fargo & Co. of Lake Mills, Wisconsin, as assignee of Wm. E. Perm and Chas. 5. Hopen.

I show you patent No. 565, 791, issued August 11, 1896, to F. B. Fargo & Co. of Lake Mills Wisconsin, as assignee of Wm. E.

Pann of Lake Mills, Wisconsin

And I show you Patent No. 531,133; issued April 20, 1897; to F.

B. Purgo & Co. as assignee of Win: E. Perm and Marsten A. Guild

Lake Mills, Wisconsin.

Were those four Letters Patent owned and controlled by F. B. Fargo Co. just prior to and at the time of the execution of said contract the 24th day of February, \$1067.

tion reserved by the F. B. Furgo & Co.

ed in as to made ey but I have forgotten

Can you tell us approximately how much it was?

I couldn't say that

Was it several thousand dollars?

A. Well, as I recollect that, the patents and our good-will were nt in for a certain amount, but I have forgotten how much

Well, the amount at which the patents were turned in was desermined by a committee, was it not?

O. How was the amount at which the patents were turned in deemined?

A. It was left to a committee.

Q. State us near as you can at what amount those patents that I have just mentioned were turned in to the Creamery Package Manefecturing Co.

A. I don't think the putents, as I recollect, were considered sepstate from other considerations.

Well, the amount of stock to be turned over in payment of ose patents was determined by that committee, was it not?

A. As I renember it was yes.

Now tell us what that amount was, as near as you can remem-

I couldn't state, but it was a number of thousand dollars.

A. I couldn't state, but it was a number of thous.

Q. Did it exceed \$10,000, Mr. Fargo?

A. Yes, I think it was more than that.

Do you think it exceeded \$20,000, Mr. Fargo?

A I should think it was somewhere along there.

Under which of these patents that I have just shown you, if was the Style B. Machine made and controlled?

A. I shink it was No. 481,133.

Mr. Cohen: We do not offer in evidence the cross-examination.

Mr. Leach . Plaintiffs offer to read the cross-examination.

(The erose-examination is then read by Mr. Reigani as follows:

Mr. Fargo will you please hand me the Letters Patent which hold in your hands and concerning which you were interrogaby Mr. Leach? Which one?

All of them.

Witness (and or one to comment)

O These are five Letters Patents, are they not? A. Yen:
O Patent No. 530,571, dated May 21, 1895, purports to be issued
of Chas. Record of Lake Mills, Wisconia, assignor to F. E. Parpo
le Car of the same place, does it not? A. It sheet.
O. Patent No. 265,720, dated August 11, 1896, purports to be
afted to Chas. S. Brown of Lake Mills, Wisconia, assignor to the

B. Pape & Co. of same place for its net.

Mr. Colum: That is objected to as immaterial and irrelevant. Objection overrolled Defendants recent

O. Patent No. 565,701, dated August 11, 1806, purports to be isued to Wm. E. Penn of Lake Mills, Wisconsin assignor to the F. B. Fargo & Co. of same place, does it not?

Mr. Cohen: That is objected to as being repetition, and the same with the rest of this page.

Objection overraled. Determinist except.

Q. Patent No. 581,133, dated April 20, 1897, purports to be issued to Wm. E. Penn and Marsten A. Guild of Lake Mills, Wisconsin, assignors to the F. R. Pargo & Co. of same place, does it not?

D. Patent No. 600,168, dated March 8, 1808, purports to be inassed to Wm. E. Penn and Class. S. Brown of Like Mills, Wisconsin, assignors to the F. B. Fargo & Co. of same place, does it not?

A ACE

Those are the Letters Patent concerning which you have ter-

tified in your escamination, are they not? A. Yes.

Q. Do you know whether or not the patents to which your attention was called had been actually assed at the time of the execution of the agreement of Pebruary 24, 1898?

I think there was part of them that had not been issued at that

Of then you don't intend to be understood as stating that the atents to which your attention had been called had been actually sould at that time?

A. They couldn't have been issued, because the contract was made before the parents were issued; but they were probably pending at that

Were the patients to which your attention has been calleda they all the letters patent which were transferred to the Cream-Package Mfg. Co. under the terms of that agreement, or do you

A Time the post ber we can our parale beide the

alente.

- Q. Besides the patents to which your attention has been called?
  Here were some other patents besides those to which your attention as been called?
- A. Some minor patents.
- Q. As I understood you to say, you don't recollect whether or act here was any specified amount fixed for the transfer of the patents love?
- A. There was at the time the deal was made; but I don't recall exectly how much it was.
- Q. Isn't it a fact that the amount for the patents and the good will if the F. B. Fargo & Co. were included in a particular amount?
  - A. My recollection is that it was,
- Q. By "it was", you mean that they both were included in the
  - A. Yes
- Q. You were asked the question under which particular letters atent the Style B. Machine was made and you have given your answer. Do you know whether or not any other parts covered by any others letters patent were used in making the machine called Style B.?
  - A. I don't think there was.
- Q. Were the rights of the inventors in and to these letters patent which have been referred to assigned to the F. B. Fargo & Co. before a after the patent was issued?
- A. The assignment was made at the time the application was
  - Q. The application for the patents-for the letters patent?
  - A. What is that?
  - Q. The application for the patents—for the letters patent.
- A. Patents and the assignment was made at the same time that the application was filed—that is the way, as I recollect it, that we did that work
- Q. Then, as I and estand you, the assignment of the letters patent is the original applicants for the patent was made to R. B. Fargo & Co. at the time the application for the letters patent was made by the aventur in the patent office.
  - A. That is right.

## GEORGE F. DARBY,

witness produced and sworn on the part of the plaintiffs and each them, testifies as follows:

## EXAMINATION IN CHIEF, by Mr. Leach.

- Where 40 per line? A. Oustonna. What is your business? A. Editor of the People's Press.

is that a weekly paper published at Owntonna? Yes, sir, a weekly newspaper. It has been published there for how long? Before I was born. Thirty-six years I think.

Did you know the date of the suits which were commenced st Mr. Virtue, one by the Creamery Package Manufacturing Comor, and one by the Owatoma Manufacturing Company?

A. L did

- Did you hear about these suits shortly after they were com-
  - A. I heard of them about the time that they had been commenced.
- It is admitted here that a final decision and decree was rendered in the suit brought by the Owatonna Manufacturing Company, rendered January 1907; in favor of Mr. Virtue and the Owatonna Familiag Mill Company, and against the Owatonna Manufacturing Company.

Yeasir.

Did you hear of that decree soon after it was rendered?

O. It is also admitted here in the plendings that a certain decree was rendered in the case brought by the Creamery Package Manufacturing Company, rendered in that same suit about that same time, providing for an injunction, which we here call the interlocutory decree, and which defendants call a final decree; did you hear about that de-

A. Yesair

- Q. Being rendered about the time it was rendered? A. Yes, sir.
- O From whom did you get your information concerning those the course

Mr. Cohen. That is objected to as immaterial and irrelevant.

The court overrules the objection, and counsel for defendants excents to the ruling.

- A. I got my information, the first information in regard to the decree from the newspapers published in Saint Paul and Minneapolis.
- 2. After you had seen those newspapers did you go to the Owa-

No. I AM

Did you go to any others or person connected with the Covic

toma Mandfacturing Company in that regard?

A At that time the Minnesota State Dairymen's Association was holding their annual meeting in Ownsonna, and I met Mr. Henro, Mr. H. C. Howe, on the street, and I published in that assue the substance of what he said in regard to that decision. I also went to the machinery display made in the Odelf building at that time, and saw Mr. Stone, and also published what he had to say with regard to that decision.

Q. Did you know who Mr. Stone was at that time? A. Yes.

Q. When you interviewed those two persons did you tell them what you wanted in the interview?

A. I didn't Mr. Howe, but I told Mr. Stone; Mr. Stone knew that was a newspaper man.

Q. Did Mr. Howe know that you were a newspaper man?

A. He certainly did.

Q. Have you that matter which you published at that time?

A. I have.

Q. Will you produce it please? (Witness produces two books.)

A. The article is on the tenth page of the People's Press issued January 25, 1907.

Q. Will you tell by paragraph which part of that article it was that Mr. Howe gave you, of the portion of the paragraph, it is in these four lines.

A. It is four lines here in the sixth paragraph.

Q. The balance of that article was told you by whom?

A. The balance of the article was a copy of the decision of the court as published in the twin city papers, and at the end was added what I got from Mr. Stone and Mr. Howe.

Q. And the four lines of paragraph six contain the substance of what Mr. Howe told you when you interviewed him upon that occas-

A. Yes,sir.

Mr. Leach. I will offer in evidence the four lines in paragraph about thich have been identified.

Mr. Cohen. That is objected to as irrelevant and immaterial, because it is a statement made by Mr. Howe under circumstances not binding upon the Creamery Package Package Manufacturing Company.

The Court. I will sustain the objection.

Counsel for plaintiff excepts to the ruling

Q. Will you tell us what it was that Mr. Howe told you upon that accession?

Mr. Colien: That is objected to on the same ground.

The court sustains the objection and coursel for plaintiff excepts

During the progress of thes law suits did you see an acco

Did you publish sections of those will being carried on you

Mis Copers Tian is applicated to a summaterial mis inclicant.

The pourt overrules the objection and connect for defendants Oper to the ruling

A. Yes, sr, from time to time.

And those articles purported to give the history of the case?

Mr. Conen. That is objected to because it calls for the contents

The Court. I don't know the purpose of this, but I will allow the

Course for defendants excepts to the rilling.

A. It did.

O. Throughout what territory does your paper circulate?

My Cohen That is objected to as immaterial.

The great overrules the objection and counsel for defendants excess to the ration

A. It circulates through Steele county and through the borders of the adjoining counties.

O. Any out of the state? A. Why some, not many.

Out of the state where?

To edvertisers, and persons who used to live in Owatonna and Steels county, who have moved away.

O: Can you name any places it went to?

Very nearly every large city, that is Chicago, New York and

Any West?

Yes air it is pretty hard to specify unless a person had the

Can you give any places?

As I said before, the paper has a general circulation, and espec-The send them to a large number of persons who had moved away com Steels, county and Owatoma.

Q. West as well as East? A. Yes, sir.

Q. North and South Dakota? A. Yes, sir.

Q. I And other states besides Minnesota? A. Yes, sir.

Q. Daving the period of the pendesce of those law suits after 100s.

you set articles in the twin city newspapers giving an account 4

How been but I have a little plate.

Por how long a period?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The court overrules the objection and cosmel for defendants exent to the ruling.

A I can't exactly remember, but it was published continually in s Saint Paul Pioneer Press and the Minnespolis Tribune.

Q. And these newspapers have a circulation throughout the state?

A Yes, sir.

O. In Minnesota and the adjoining states?

Yes, sir, in the Northwest.

Mr. Cohen. I move to strike out the testimony of this witness as what he saw in the newspapers, and as to what he circulated in is own paper.

The court denies the motion and counsel for defendants excepts to the ruling.

## EROSS EXAMINATION by Mr. Cohen.

Mr. Darby, you say there were accounts published by you of the rogress of these lawsuits?

A. There were.

O. How many accounts do you remember?

A. I remember distinctly at the time hearing a great deal of talk a the street with regard to-

Mr. Cohen. I try not asking you about that, will you kindly answer my question?

Q. How many accounts can you remember?

A. I so unable to state distinctly as to the number of accounts at were published.

Would you be positive that there were more than two or three?

I would be positive of that, ves.

More than that? You have stated that you saw other accols relating to these lawsuits in the city papers.

Yes, sin-

depar be positive that there were more than five or six

A. Yes, sir.

Q. In different papers! A. 'es, sir.

Did I tinderstand you to say that there were continual publitions, is that what you said? How often do you remember that ere was surething said in the newspapers about that lawsnit?

A. After the action had been started there were several articles written both the twin city papers with regard to it.

Q. That is at the time of the confinencement of the action, after the papers were filed.

A. Yes, sir, after the papers were filed.

Q. Have you any recollection of any article at the time the answers were filed?

A. I have not.

Q. Can you give a statement of the number of times that you saw articles relating to this litigation in the twin city papers,—by that you mean Saint Paul and Minneapolis, do you?

A. Yes, sir. I couldn't positively state the number of times that I have seen articles.

Q. You couldn't swear positively?

A. No, but I can swear positively that I have seen those articles, because a number of times I clipped them.

Q. You have said some time, but the number of times you cannot say?

A. No, sir.

Q. You wouldn't venture to approximate it would you?

A. No, I would not.

Court is now adjourned until 9 o'clock a. m. the next day July 31st, 1909, at which time the case is proceeded with as follows:

Mr. Leach. We now offer and read in evidence the deposition of E. W. Knatvold, taken at Albert Lea, Minnesota, June 29, 1909:

MR. KNATVOLD, sworn, testified.

By Mr. Leach:-

- Q. What is you full name Mr. Knatvold? A. E. W.
- Q. You live in Albert Lea? A. Yes, sir.

2. How long have you lived here?

A. I have lived here since the year 1891.

Q. What is your present business Mr. Knatvold?

A. I am in the creamery supply business, selling supplies to creameries.

Q. How long have you been in that business?

A. Since 1897, in February 1897.

Q. What is the name of the concern?

A. The Northern Creamery Supply Houses

Q. How long have you been running the Northern Creamery Supply House?

- A. Since about the first of Hebruary 1897.

  O. Is that a corporation or a partnership?
- A. It is no partnership at all I am owner and manager of the whole thing.
  - Q. It is not a corporation then? A. No, sir.
- Q. And you are and have been since February, 1807, the sole owner and manager of the Northern Creamery Supply House, have You?
  - Yes, sir.  $\mathbf{A}$
  - And your present office and place of business is at Albert Lah? O.
  - A. Yes, sir.
  - Q. And has been during all those years? A. Yes, sir.
  - Have you ever had any other place of business? O.
  - A. No, not after that time.
  - O. During those years have you carried stock in trade?
  - A. Yes, sir.
  - O. Consisting of what, Mr. Knatvold?
  - A. Creamery supplies of all kinds.
  - Combined churns and butterworkers? O.
  - I never carried them in stock. A.
- Have you sold them during the years you have been in business here?
  - A Yes, sir.
  - During all the years you have been in business?
  - A. I think so, I hardly think there was a time but what I sold some.
  - What kind of combined churn and butter worker did you handle?
- A. The Dishrow and Victor. I have sold the Fargo churn too. I am not positive about that the whether I have sold the Fargo chura or not.
  - Q. Have you ever seen the Simplex? A. No, air.
  - Q. You know what they are do you not?
  - A. Yes, I know what it is but I have never seen it.
- Through what territory have you been selling the supplies during the years from February 1807, on up to the present time?
- A. Well, I have sold over the Milwaukee road as far west as Jackson; I have sold on the M. & St. L. road to New Richland and south to Forest City, and sold on the Iowa Central as far as to Kenseth. I have sold to Mason City.
  - Q. What have you sold at Mason City?
  - A. I have sold the Wyandotte Washing Powder.
- Q. How many combined churns and butter workers have you sold altogether?
  - A. I could not tell, I have sold a good many.
  - Q. Give us your best estimate, Mr. Knatwold.

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. Let me see, I have sold between thirty-five and fifty.

That is from February 1897, up to the present time?

Yes, sir, up to the last of December. I have not sold any since

Up until in December? A. Yes, sir.

Q. Did you have during that time a contract for the agency for selling the machines with any concern?

A. Well, I am not so sure if I had a contract in 1807, but I had one in 1898 and up on until 1899 the latter part, I had a contract in 1898 and 1800 and then I did not have a contract for two years, I quit them.

O. And then at any time after that, did you have a contract for the

selling of those churns?

A. Yes, sir, in 1902, then I entered into a contract with them.

Now with what concerns were those contracts?

A. The Creamery Package Manufacturing Company.

O. Of Chicago? A. No, of Minneapolis.

O. And have you any of those contracts here now Mr. Kna-Sploy

A. I have one here.

Q. May I see it please? A. Yes, sir.

(Handing contract.)

Q. This contract appears to be dated January 15th, 1908, if that the only contract you have been able to find, Mr. Knatvold?

A. Yes, sir, I have looked but could not find any other, I must have misplaced it. The trouble is we moved and when we moved from one building to another, we destroyed many papers and it may have been with them.

Q. How long a time is this contract for Mr. Knatvold?

A. For one year.

Q. And you have looked at all the places where you usually kees contracts of this kind Mr. Knatvold?

A. Yes, sir, I have.

O. And you are sure you cannot find any of the other contracts?

A. No, sir, I cannot find any of them.

Q. The contracts you had before you made this contract, was each one for one year?

A. Yes, sir.

Q. Made about the same date of each year?

A. About, I don't remember about the first one, that was made with the Creamery Package Manufacturing Company of Wells.

Q. Who represented the Creamery Package Manufacturing Company of the making of these contracts with the Northern Creamery Supply House or yourself?.

- Mr. Haves was the one that man the gree one with that was Wells.
  - What was his initials? A. I don't remember.
  - O. Is he the president of the company?
  - I don't know, he is in Chicago now. A
  - That was in 1808? 0.
  - Yes, sir, it might have been the latter part of 1897. A.
- O. And who represented the Creamery Package Manufacturing Company when you made the next one?
  - I am not sure but what he did.
- O. And who represented the company in 1002, when you made your ontract then?
  - A. Now, I can't think of his name just now.
  - Q. Was it Mr. Cooper?

  - A. Cooper, yes sir, that was the name.

    Q. Where was he from? A. He was at Minneapolis.
  - Q. Was he the manager at Minneapolis? A. Yes, sir.
  - Q. Do you know how long he was manager there.
  - No sig. I do not. A
- How many contracts did you make with the Creamery Packge Manufacturing Company?
- A. I think it was three that I made, I am not sure, but I think it & three.
  - Q. They are lost are they? A. I cannot find them.
  - Q. You cannot find them? A. No sir.
- O. And during all that time was Mr. Cooper at Minneapolis?
- Yes sir.  $\Delta n$
- And where did you make those contracts, here or at Minne-Q. polia?
  - A. At Minneapolis.
  - Q. And each for one year? A. Yes sir.
  - Q. Was each one of these contracts substantially the same?
- Q. Do you remember the substance of the contracts that you made with Mr. Cooper, Mr. Knatvold?
  - A. Yes sir.
- O. What was the substance of those contracts, were they the une or not the same?
  - A. No sir.
  - Q. Give me the substance of the contracts?
- A. Practically the small things that I bought from them being on the specialties they gave me fifteen per cent.
  - Q. Fifteen per cent off the selling price?
- A. Of this price, Mr. Higgs gave to me thirty per cent. this contract calls for ten per cent.

What were then operation, Mr. Knatrott?

They were charas, vats, milk weighers, milk heaters, stampesters and manuary pumps, represents, milk separators.

What kind of charas?

It was the Disbrow and the Victor.

Was it known as the Combined chira basier workers?

O Did you sell my offer hand of charm besides those? A. No sr. Q. During all of the time since 2897?

A. Yes sir, I have sold what was called the squeezer and the as the year I did not have any contract with the Oceanery Package ompany.

O Econ whom do you get the Squeezer

A Lam not sure of it, I think it was from A. H. Basher from Chicago, at the time this Squeezer churn was sold here, it was only one I sold then I was in Minneapolis as Deputy Char Grain Inspector and Mr. Ariner, of Justicina was then running my business here and I know that he sold one Squaezer churn to the Manchester Creanery, but it was afterwards taken out, but where we got it I could say but I think a was from A. H. Barber or the Cornish, Curtis, Greene Company.

Q. And during what year was that?

In the year of 1901.

Q. And during that time how many Squeezer churns did you sell?
A. Only one that I can remember:
Q. Did that go to a creamery in this county? A. Yes sir.

Q. At the time you were making those contracts with the Cream-Pathage Manufacturing Company, did Mr. Cooper ever make any statements to your about the conditions of the churn trade of the country?

I can't remember.

As to who controlled the churn company, did he ever tell you?

He may have but if he did I have forgotten.

Who represented the Creamery Package Manufacturing Conpany when you made your last contract?

H. W. Rice.

Q. Is he manager at Minneapolis? A. He was then.
Q. Did he succeed Mr. Cooper? A. I think so.

Were those contracts made in Minneapolis also? A. Yes sir. Do you know what therms and butter workers are being used in this county now Mr. Kanaveld?

Mr. Cohen: That is objected to us immuterial and irrelevant.

A. I know pretty nearly all of them.

O. What churds are now in use in this county?

Mr. Cohen: That is objected to as immisserial and strategian.

Objection overvaled. Defendants excepts

A. The Disbrow, the Victor and the Ferfestion claum.

O. Any other charac besides these three in use in this county now?

Mr. Cohen: That is objected to as immaterial and irrelevant Objection overreled. Defendants except

A. I don't know of any.

O. And how many creameries have you in this company?

Mr. Cohen: That is objected to as unmaterial and involvement. Objection overruled Defendant except.

A. We have twenty-seven.

O. About what portion of churns of this county now are Disrow and Perfection churus, do you know Mr. Knatvold?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. I could not say because I don't remember how many churns ch creamery has got, some have two and some have one.

Q. Do you know how many Perfection churns there are in the ounty?

A. No sir, I am not positive.

Q. Prior to the time that Perfection churns came on the market, that churns were in use in Freeborn county.

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

A. The Disbrow and the Victor.

Any others besides these two?

Why, yes, there was the Pargo. A churn that had been used here great deal in former days.

Q. Any other? A. And the Squeezer.

O. The Squeezer was made and sold by A. H. Barber?

A. Yes sir, either Barber or the Cornish, Curtis & Greene Company.

Of Wisconsin? A. Yes sir, of Wisconsin.

Any other churns besides those that you know of that were ed in this county before the Porfection was used?

A. I do not remember of any other.

Q. And during that time you were familiar with the churns in se in Freeborn county were you not, Mr. Kestwood? A. Yes sir.

Q. Do you know what churns are in use in other counties outside of Processes county? A. No sit, I could not tell.

Q. Dide year league the Creamery Peaking Mountacturing Com-

During what period were they selling the Wizard?
Thus was about the time I commenced with the Creamery is I think I sold one of them.

And did you know of the company handling and selling the

No sir, I did not know of that.

Were you pretty well acquainted with Mr. Higgs?

Yes sir.

That was in the year 1808?

Yes sir, in the year 1897 and 1808.

O. Have you seen him since about that time? A. No sir.

Did you ever receive any letter from any of the Creamery Package people, as to the condition of the churn trade of the county of the combined butter workers, Mr. Knatvold?

I may have had but I can't recall them.

Have you any letter now from them or circular instructions that you received from the Creamery Manufacturing Company in regard to the conduct of their business?

A. Why, I think I have.

Q. Where do they come from? A. They come from Minneapolis,

You think you have some of those now? A. Yes, sir.

Q. Both letters and sheets of instructions?

A. Why, I have letters, I don't know as there is any instructions in particula

O. Could you get them pretty quick, Mr. Knatvoid?

A. It would take some time, it depends about what time you want to get back. I don't know as I can find them way back from the bebeginning, because as I said before, when we moved we destroyed a lot of superfluous papers and it would take me some time to sort out the papers.

Q. About what portions of the churns in use in Freeborn county evious to the time the Perfection came on to the market the Victor or Disbrow?

A. I think they were all, either Victor or Disbrow.

Mr. Cohen. We will not offer any of this cross examination,

Mr. Williamson. We will read the cross examination.

Examination read by Mr. Williamson.

## CROSS EXAMINATION

Q. In what years were you state way master, Mr. Knatvold? A. I was appointed in they and continued until August 1901, I as impector not way master, I was deputy chief grain impactor.

- During that year you did not run your business grannels here.
- ). Who can it for you?
- Mr. Adair, and my oldest son Halder Knatvold. During that time you were not so familiar with the business as were before and afterwards! A. No sir.
- It was while you were bolding that special office that the transtion resulting in the sale of one Squeezer machine occurred?
  - A. Yes sig.
- O. You are not able to say whether or not there was any other schines sold or not? A. No sit-
- O. Are you able to say whether there were any other Squeezer ichines or not? A. No sir.
- O. Do you know positively or is it an impression that A. H. Barber ndled the Squeezer machine? A. I could not say.
- Q. You do not know if it was the Cherry Company that sold Squeezer? A. No sir.
- Q. You are not positive who handled the Squeezer?
- A No sir, I am not.
- Q. You know the Dairy Queen Combined Butter Workers?
- A. Never saw it that I know of.
- O. Never saw it that you know of? A. No sir.
  O. Did you ever see a Squeezer Combined Butter Worker?
  A. Yes sir.
  O. Many of them?

- A. No, not very many of them, not more than one or two.

  Q. Ever seen a Simplex Combined Butter Worker Churn?
- I do not think I have.

Mr. Leach. We now offer in evidence on the part of the plaintiffa id each of them the deposition of A. T. Barlass, taken May 16, 1909.

A. T. Barlass, sworn, testified as follows

Escamined by Mr. Leach.

Qr. You live in Chicago, Mr. Barlass? A. Yes sir. Qa. Were you ever in the employ of the Creamery Package Manubeturing Company, which we will call for short the Creamery Co? A. Yes sir.

Oz. Between what dates?

A. It was from January of 1896, as close as I can remember, Jan-

C4 And how beny did you remain with them?

Os. When you quit the Occamery Co. is whose employment were on directly afterwards? A. National Creamery Supply Co. Os. Do you remember the date you went to more for them? A. In March, I think it was March 17th, 100s.

Oz. And you remained with the National Greenery? A. A year, Os. Then you left the National Cream Supply Co. in March?

Qu. Ace you sure of that last date or time. March 1906? A. Yes Quo. When you were with the Crossnery Company where were

At 113 and 5 West Washington trees, Chicago, Illinois.

Ore: Was that the main offices of the Cronnery Co. in Chicago?

Qua. What in general were your thities there during those 6

A. Why, first year I was helping around the warehouse, the second near I was receiving clerk, most of the third and four years I was stock treeper, and the last year I was assistant in the perchasing de-

Q13. About how soon after Feb. 24th, 1898, if at all, did you learn of the purchase by the Creamery Co. of the Fargo Co., and the Curtis & Greene Co., and the C. E. Hill & Co. and A. H. Barber Co. I will A. I heard of it at the time they took inventory.

Old Of what stock? A. The Cresmery Co. stock.

Q15. In Chicago? A. Yes.

O16. Did you assist in the taking of that investory in Chicago?

A. I helped count the goods.

Q17. While you were with the Creamery Co. did you know of a act country between the Occamery Co and D. H. Burrell & Co.!

Q18. Did you see that contract? A. Ven. Q19. That contract related to what?

Mrs. Cohen. That is objected to as immaterial and irrelevant, and calling for the contents of a written instrument.
Objection oversaled. Defendants except.

To Simplex charge

Q26. Will you state as near assyot can the substance of that con-act that you as between the Greamery Company and D. H. Burrell

the Couch. The same objection as to the his question.

contract and walled the second

Culting the Country of the Roams Day

Mr. Leach: We offer in evidence Exhibit P.5; being article served on Mr. Cohed, July 7, 1909, calling for the production of any and all practs which have ever been made between the Oceanory Package rufacturing Company and D. H. Burrell & Commany

ifr. Cohen. That is objected so because the notice is too fiesed, a does not lay a basis for secondary evidence.

the Court overrules the objection and counsel for defendant asis to the ruling.

Mr. Lesch. I will withdraw question so.

Dat. Where did you see that contract? A. In the files.

Daz. What files?

The contract files in the purchasing department.

23. You mean the purchasing department of the Creamery Co.?

Did you have to do with that contract in your duties about

A I don't just understand that question; there is do you want to whether I had to do with that particular contract or with the stract files.

25. Did you have access to the contract files? A. Yes.

26. Did you see and read that contract? A. Yea.

Day. Give us the substance of that contract as near as you can ember it?

Mr. Cohen. To that question we object as immaterial, irrelevant incompetent, and because it calls for the contents of a written inument without sufficient foundation having been laid for the introction of secondary evidence.

Objection overruled. Defendants except.

As It was an agreement between D. H. Burrell & Co. and the ery. Co. whereby they were to have the exclusive sale of Simplex ns in certain western territory for a specified length of time, and maideration of that the Creamery Co. were to pay certain royalties a number of churns to D. H. Burrell & Co. and they agree

infacture a certain number of Simplex chures at one of their Wis-

in factories during the time of that contract.

28. How long had that contract to run according to its terms NOT left the Oremery Co.

in Cohen. Seine objection as last above.

everaled. Defendants - v. ....

A. I don't remember to actly, both think one year.

One. Give us the substance of the contract as near as you can us egand to what territory it should cover. If there was any thing of that and in the contract?

by Cohen: That is objected to as immaterial and irrelevant. section overruled. Defendants except.

As I remember it the western territory I spoke of was all territory west of Pennsylvania and New York and north of the Ohio river, and I don't remember about other specifications as to territory e contrat

Ogt. What was in the contract in regard to the royalties you spons

Mr. Cohen: That is objected to as immaterial and irrelevant.

lection overruled. Defendants except.

The Creamery Co. agreed to sell and to pay a royalty, it might have been \$15.00 on a certain number of churns, and they agreed to pay the royalty whether the given number of churns were sold or not

Q32. Did the contract state how much royalty should be paid to the Creamery Co. to D. H. Burrell & Co. on eac' Simplex churn sole by the Creamery Co.? A. Yes, it did. Q13. State that amount as near as you can remember it?

Mr. Cohen. I submit that all these questions with regard to the contents of the written instrument should be taken subject to the same objection, ruling and exception.

The Court. Yes

A. \$15.00.

Q34. Did that contract state how many Simplex churns should be h year by the Creamery Co.? A. I think it did.

Tell us what the contract contained if anything, as to the number of sales of the Simplex churn to be made by the Creamery Co.

A. I can't say.

Q36. Can you give us approximately the number? A. It might have been 200 churns.

Q37 In how long a time? A. During the life of the contract. Q38. Where was that contract when you saw it last? A. In the files. I never saw it but once.

Q39. In the files of the Creamery Co.? A. Yes.
Q40. While you were with the National Creamery Supply Co. of you handle, or did that company handle and have for sale the com-ned churn and butter workers made by the Owetonna Faming Mil 012 Z

De la la Caracante de La Carallan Lordo La Carallan 1943

ing to make take to prospective purchasers of a churn made by the storms Fanning Mill Co.? A. Yes.

M42. Was that true during all the time you were with the National Creamery Supply Co.? A. I don't understand the question.

M43. Did you while you were with the National Creamery SupCo. make any sales of a churn made by the Owstoms Faming Mill A Ven

Let. That was during what part of the time that you were with National Company, meaning the National Creamery Supply Co.?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

During the third year with them.

045. How did those churns work that you sold during that period?

Mr. Cohen. Objected to as immaterial and irrelevant, and because witness has shown no knowledge upon the subject.

Objection overruled. Defendants except.

Satisfactorily.

Q46. About when did you discontinue the sale of the Owatonna nning Mill Co. churns? A. About the beginning of 1905.

147. Did you then take up the sale of any other churn in the ce of the Owatonna Fanning Mill Co. churns?

Same objection.

Objection overruled. Defendants except.

A Yes sir

048. What churns?

Same objection.

Overruled Defendants except.

The Simplex.

240. What did you call the churn made by the Owatonna Fanning Co. which you sold? A. The Owatonna.

go. Why did you change from the Owatonna churn to the San-SCHOOL STATE

Mr. Cohen. Objected to as immaterial and irrelevant, and as callfor a statement as to the state of mind of the witness.

Objection overruled. Defendants except.

A. Because we were unable to make sales of the Owatonna churn. Dra. For what reason?

Mr. Cohen. That is objected to for the same reason shown last

jection overruled. Defendants except.

There was considerable question among the trade about whether

n: That is objected to as immaterial and irrelevant

Objection over folder before and the

escally I fine lead of that E.W. Wast of St. Pa Osa. How, if at all, were you made aware of that in your trade?

Mex Cover 12 object to the question on the protect that it surp is for tearney criticism and is immediated and involvement, and restre of the c

Obignism overment Datendant erzeit.

A. Our salesman reported that where they were figuring on or citing an Owatowns chain the customer had brought up the point he been advised from other salesmen or other sources that Owatowns was an infringement, on another churn or churns, and that he would be hable to be used for infringement if he bought and

Q53. When, if at all, did you hear that suit had been brough amen the Owatonna Parming Mill Co., for infringement?
A. Sometime in 1908, as I remember it.

Q56. Will you look at Exhibit double QG and tell us if that is a letter that you wrote and maked to the Owstones Fauring Mill Cost shout the date it bears? A. That is a letter I wrote.

Qs8. What kind of a trade did your company have in the Simples churn during the time you were with it? I mean the National Conpany? A. A very good trade.

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overruled. Defendants except.

Q50. Tell as what you know as to how generally it was known among the trade that infringement suits had been started against the Owntowns churn or that claims of infringement were made against that churn by the people claiming the Disbrow churn patent at the time you quit selling the Owatonna churn and commenced selling the Simplex churn?

Mr. Cose : That a solicited to as immiserial and irrelevant. Objection overraled. Defendants except.

All lines show that if this wherever we were comparing to If an Owstonia churn the customer seemed to be well informed out the sum or suits which had been brought against the Owstonia

Q60. During the latter part of the time you were handling the

Mileson and the last of the la 

We didn't receive up decisions that I fallow of from pareticular, the question nearly blance stated by prospective hurses what would guaranty their against any trouble which angus was from the be-

COL. Welle jour terr with the Cristons Co. (6) the toronous sell rertalis? A. Ye

Qua. Were there other concerns selling batter title during the me parod! A. Yes.

264. Where was that mutual agreement made?

A. I don't know, that is so to the place where the agreement was

Cos. How did you learn of it?

A. I have seen different memorandums of the agreements.

A. In the office of the Creamery Co.

O67. Did you see more than one of those mutual spreements or morandums. A. I don't remember.

068 About how many of the Simplex churns did the National Company sell while you were with it after you quit the Owatonna prn?

Mr. Cohen: That is objected to as immeterial and irrelevant. Objection overrated. Defendants except

A. I would say about 25 or 30.

Mr. Cohen. There are some questions I do not wish to read, if I think the better way would be if plaintiff wishes to read what I nic he can read it afterwards.

The Court. Yes.

Mr. Cohen. I will not read question 72 or 73-

# CROSS EXAMINATION READ BY MR COMEN IN PART.

XQ70. You stated that the last year you were in the employ of the reamery Co. you were assistant in the purchasing department, who are you assisting? A. Mr. Patrick, and Mr. G. F. Bellmap.

XQy1. What did you do as such ascistant?

A. I did purchasing and got prices on rock and final contracts, oked up contracts( etc.

XQ74 About how many articles did the Creamery Do. deal in hen you left there? A. Why, in a very wide line.

XO75. Several kandred, steren't there? A. Ves.

CONTRACTOR SERVICE

A. Yes sir, I don't doubt there were that many.

XQ77. And they all related to the creamery and dairy supplies, did they not? A. Why, directly or indirectly, yes.

XQ78. And that was about the range of their business during the entire time you knew them, by range I mean the extent in the number of articles dealt in? A. Well, they dealt—yes, it was.

XQ79. In question 13, in answer to 13, you stated that you heard of the purchase by the Creamery Co. of the Fargo Co., of the Cornish, Curtis & Greene Mfg. Co., A. H. Barber & Co., and C. E. Hill & Co., at the time they took the inventory. Do you remember about what time of the year that was? A. Near the spring time.

XQ80. From whom did you learn the Creamery Co. made such

purchase?

A. Well, the information on that subject that I got was from the employees of the firms mentioned, who were engaged in taking the inventory at that time, but I didn't understand at that time that the purchase was already made; I understood that that inventory taking was a part of the purchase or transaction.

XQ81. Well, you learned shortly afterwards that the purchase

had been consumated?

A. Yes sir, shortly afterwards that such purchase had been con-

XQ82. There was no secrecy about the information? A. No.

XQ83. It was generally understood, was it not by all the employees of the Creamery Co. at that time that such purchase had been made?

A. It was by-it was so understood by all the office help and salesmen, as far as I knew.

XQ84. You mean the office help and salesmen of the Creamery Co.? A. Yes sir.

XQ85. You never talked to any person while in the employ of the Creamery Co. outside of its employees as to such purchase being made?

A. I talked with my folks about it, at my home.

XQ86. Did you talk to any of your creamery customers? A. No. XQ87. Did you have any directions from any one connected with

the Creamery Co. to keep such purchase secret? A. No.

XQ88. You wish to be understood then that you didn't talk outside about this purchase simply for the reason that no occasion arose for disclosing that fact while in their employ? A. Yes.

XQ89. I understood you to state that you saw a contract between the Creamery Co. and D. H. Burrell & Co., and that you saw that contract but once, am I correct? A. Yes sir.

XQ90. Can you fix the time when you saw such contract?

A. I think it was in the fall of 1901.

XQqr. Do you know the date of such contract? A. No.

XQ92. Do you know how long it purported to sun?

A. The impression that I have with me is 2 years, that was the period, the life of the contract.

XQ93. Two years? A. Yes.

XQ94. Then you want to be understood that that contract was made in 1900 and extended over a period of two years?

A. Yes, that is about as I remember it, although it might have

been entered earlier.

XQ95. Then you have no recollection as to the date of the contract? A. I have no recollection of exact dates.

XQ96. How much time did you spend in examining that con-tract?

A. I can't say about that, but long enough to read it over:

XQ97. What was the occasion of your reading it over?

A. Simply that I was interested in all contracts which were made through that department.

XQ98. What department do you mean?

A. Purchasing department.

XQ99. In answer to question 26, you were asked can you give us approximately the number, referring to the number of churns the Creamery Co. were to make under said Burrell contract? and you answer, it might have been 200 churns; is that as near as you can remember? A. Yes.

XQ100. That is a mere guess, is it not?

A. I would call it an impression.

XQ101. When did you first talk to Mr. Virtue or his attorney about this Burrell contract?

A. I think I mentioned the fact of the Burrell contract to Mr. Virtue sometime in 1903.

XQ102. That time was after you had left the employ of the Creamery Co. and had entered the employ of the National Creamery Supply Co.? A. Yes.

XQ103. What were your duties with the National Creamery Supply Co.?

A. Purchasing agent and manager.

XQ104. Did you occupy that position, or were you an assistant to the manager? A. I was the manager.

XQ105. How long did you occupy the position as the manager?

A. About one year.

XQ106. Can you fix the date you ceased to act as manager for the National Creamery Supply Co., which hereafter for brevity, I will call the National Co.? A. Sometime the first part of 1905.

XQ107. Then what did you do?

A. The same work, except that I was not looked to as manager of

the business

XQxdl. During those two years did you personilly make any rules of the Owatonna churn?

A. I didn't make any sales by litting present in parson, but I sold car. Ownerms sales through salesmen working under my direction.

XQ109. Then you personally made no sales of the Owntonna churn

while you were in the employ of the National Co.?

A. I made sales only as described before.

XQ110. You can answer this yes or no. You personally made no sales while in the employ of the National Co. of any Owatoma churn? If you cannot answer yes or no, say so?

A. I don't think I can say positively about that.

XQ111. Did you or did you not go out on the road to self Owatonna churns while in the employ of the National Co.?

A. I did occasionally.

XQ112. How often? A. Perhaps once a month.

XQ113. For hoy long a period? A. Referring only to the churm? Q. Yes? A. Perhaps about one year.

XQ114. That was the last year while you were in their employ? A. No, that was the third year.

XQ118. What churus were the National Co. selling before they onumenced to sell the Owatonna churn? A. The Squeezer.

XQ119. The Squeezer was a combined churn and butter worker, was it not? A. Yes sir.

XQrao. Who was it made by?

A. At that time it was being made by the Dairy Specialty Co. XQ121. Of Philadelphia? A. Yes.

XQ122. Is it not made to your knowledge by Hunt, Helm, Ferris & Co., Harvard, Ill.? A. No, it is not.

XQ123. Who does make it now? A. The Dairy Specialty Co.

XQ124 Was it a patented churn? A. They claim that it is.

XQ125. It is sold generally throughout the United States? A. Yes oir.

XQ126. Sold generally by dealers in creamery and dairy supplies? A. It is sold by dealers, I soppose, but not extensively.

XQ127. Not what? A. Not extensively.

XQ128. The Dairy Specialty Co. publish a catalogue, do they not of churus and dairy supplies and distribute that through the country, do they not?

A. I know that they publish a catalogue of their churus, but I don't know of any catalogue of their supplies.

Mr. Cohen. I will not read from question 129 to question 147 inclusive.

KQ148. What complaints were made, if any there were, to you

personally, by any prospective purchaser of the Owstonna churn, that they would not purchase such churn because of the suits instituted by the Creamery Co?

A. There were no complaints made to me personally only to the company, for which I was acting:

(This concludes the reading of the cross examination by Mr. Cohen)

Mr. Williamson. The plaintiff will read certain portions of the cross examination of the deponent which were not read by counsel for defendants.

(Mr. Williamson reads as follows)

XQ72. As such clerk you kept a memorandum of the costs of the material and articles dealt in by the Creamery Co?

A. On a good many articles they deal in.

XQ73. And you entered such costs in a book kept for that purpose, did you not?

A. When I had occasion to I made entries of costs in the cost

XQ116. Do you know when they began to sell the Owatonna churn?

Mr. Cohen: That is objected to as immaterial and irrelevant.

Objection overruled. Defendants except.

A. Yes.

XQ117. When?

A. In the last part of 1902 or the first part of 1903.

XQ129. After you left the National Co, what business did you engage in? A. Creamery supply.

XQ130. How long have you been in that business?

A. Three years.

XQ131. Where have you been located?

A At 54 West Washington Street, and in 1722 First National Bank Building, Chicago.

XQ132. Do you carry any stock? A. Yes.

XQ133. Over what territory does your business extend?

A. Mostly through the middle west.

XQ134. Have you any traveling men out for you? A. One.

XQ135. How long have you had him out traveling?

A. I have had one man most of the time.

XQ136. In your present business do you sell combined churn and botter workers? A. Yes, I try to.

XQ137. The manufacturers of combined churn and butter workers generally have circulars of their particular manufacture do they not? A. I believe they do.

KO138. Do you receive those circulars from time to time?

A. I receive some circulars.

XQ139. Have you been out on the road since you have been in

XQ140. For what length of time and when were you out?

A I couldn't say as to that: I am never out very long, not more than one or two days, and I go out whenever I receive an inquiry for a churn when it seems necessary.

XQ141. Aside from selling churns, I mean combined churns and butter workers, what other business was the National Co. engaged in

A. Selling all kinds of creamery supplies, egg cases, fillers, boilers,

engines, etc.

XQ142. That is the National Creamery Supply Co. was engaged in substantially the same kind of business as the Creamery Package Manufacturing Co., was it not? A. Yes.

XO143. When did the National Co. commence to do business, if

you know?

A. About the 1st of March, 1902. The two months preceding that they were getting ready to do business.

XQ144. Do you know whether or not their business was increasing or decreasing in volume while you were connected with that company?

A. It was increasing.

XQ145. How many traveling men did they have out on the road the last year you were with them selling combined churns and butter workers and creamery and dairy supplies?

A. Five and six, sometimes.

XQ146. Over what territory did these traveling men solicit business? A. In the middle west.

XQ147. What do you mean by the middle west?

A. Michigan, Indiana, Illinois, Wisconsin, Minnesota and Iowa.

XQ149. Mr. Barlass, you were of the opinion, were you not, that the National Company were doing a good trade in the Owalonna churn up until the time, or about the time, the Creamery Co. started the suits against the Owalonna Fanning Mill Co.?

Mr. Cohen. That is objected to as immaterial and irrelevant, and as calling for a conclusion of the witness, and because no proper foundation has been laid for the question.

Objection overruled. Defendants except.

A. Yes, fairly well, considering they had only been handling that churn a short time.

XQ187. Did the Burrell contract, of which you have spoken contain any condition as to payment for the churns which you say were to be manufactured at one of the agencies of the Creamery Co.?

A. I believe there was a price fixed on those church that were to be

manufactured.

XQ180. Was Mr. Virtue a customer of yours? A. No.

XQ190. Have you had any dealings with him?

A. Not that I know of.

XQ191. Do you know what company he is now connected with?

A. Well, I could not name it just now.

XQ192. The Owatonna Fanning Mill Company?

A. I think that is the company.

XQ193. Have you had any business dealings with the Owatonna Fanning Mill Company?

A. Not since I have been in business for myself.

Re-direct examination read by Mr. Williamson.

RD204 Did the National Creamery Supply Company ever manufacture any combined churn and butter worker?

A. Not while I was with them.

RD205. Did they ever manufacture any such churn so far as you know? A. No.

### D. E. VIRTUE,

being duly sworn on his own behalf as one of the plaintiffs, testifies as follows:

# EXAMINATION-IN-CHIEF by Mr. Leach.

You are one of the plaintiffs in this action? A. I am.

Where do you live? A. Owatonna, Minnesota.

Q. How long have you lived in Steele County, Minnesota?

Fifty years.

Have you lived there all your life? A. Pretty near all my life. I was born in Columbia County, New York.

How old were you when you came to Steele County, Minnesota?

A. I was not a year old.

Q. Have you lived there ever since. A. That has been my home.

Q. Steele County, ever since? A. Yes, sir.

Q. In the city of Owatonna? A. Not in the city of Owatonna all the time. I was raised on a farm five miles northeast of the city of Owntonna

Q. In what business were you engaged during the month of July, 1904

A. I was in the implement and creamery and dairy supply business, and making some creamery specialties, and contracting.

What was your connection at that time with the Cavaton

Fanning Mill Company?

A. Why, that was where we made our machinery. I was the lar st stockholder in the company, and we were building out machin

What office, if any, flit you hold in that corneration? Q.

7.76 I was president.

O. How long had you then been president?

Since its organization.

When was it organized? A 1802 I think 0.

Where was the principal place of business of that concern?

What was the nature of the business of the Owatoma Fanning Mill Company from the time of that organization, up until July, 1004

We made Fanning Mills.

During what period? A. Well, we made the most of the farning mills along through the nineties.

O. Did you make some in the present century? A. A few:

O. What other business was the Owatonne Fanning Mill Company engaged in during that period? A. We made some hay slings.

Q. What else?

A. Stump machines, stump pullers, tanks, water tanks, and some wagon boxes.

Q. When did the Owatonna Fanning Mill Company, either alone or yourself personally, begin the manufacture and sale of combined chura and butter workers, if at all?

A. We built the first anchine in the latter part of the year 1901. We had built a small machine before; Mr. Deeg and I had built a machine and tested it out, a small machine, Martin Deng.

Q. From that time on did you build and manufacture and sell conbitted churns and butter workers made at that manufacturing plant in Owatonna?

and continued manufer turing machine A. We made from that time.

Q. Have you a fist, a memorandum showing the dates and places of sales of combined churns and butter workers made either by the Owatours Fanning Mill Company, or by the Owatonus Fanning Mill Company and yearself personality? Have you a list of that kind?

A. Yes, sir.

Q. When did you begin to have an interstate trade, if at all, a the manufacture and sale of combined churns and butter workers?

Mr. Cohen. That is objected to because it is too indefinite, as to whether it means with reference to the Owatonna Fanning Mill Company or not. This is a joint action. I judge from the last question

at this calls for an answer to the question whether he has a list place made by himself and the Owntonna Fanning Mill Company at the question is too indefinite.

The Court What is the object of the question?

Mr. Leach. To show the extent of the business of the plaintiff, a preliminary, and to show that they were driven out of business by a commencement of this suit, and by circulation of these rumous.

The Court. I have serious doubt about the question as to whether be damages alleged in the complaint are such damages as are contomiated by the Act. I would like to have that question discussed and regued and decided before we go into this question of damages, because if after argument I should be of the opinion that the damages assed by the bringing of these two suits are not such damages are contemplated by the Act, that would practically end the case, I appose.

Mr. Leach. I will take up then first the question of damages ariste from these rumors.

The Court. Those are, as I understand the case, all in connection with the suits, and were statements made that suits had been or would be commenced. I think for the purpose of this discussion that this mestion can be grouped with that concerning the commencement of the actions; but to my mind the serious question is as to whether dameges caused by the commencement of these actions are damages for which the Creamery Parkage Manufacturing Company, or the other defendant would be liable under the Act. Is there any sufficient evidence to show that the commencement of the suits was part of the so-alled scheme of conspiracy? If you have any evidence upon that point think it should be presented first. I would like to have all the evidence pon that branch of the case and on the question of monopoly presented list, so that when we come to discuss the question of damages we will ave all the evidence before ue.

Mr. Leach. It also hears upon this question. We propose to show hat this plaintiff acquired this business and had this interstate business, and after he had secured a line of customers and had commenced the nanufacture and sale of their churns, Mr. Cooper the Minneapolis General Manager of the Creamery Package Manufacturing Company went o Owatonas and tried to make a contract with Mr. Virtue similar to he contract made with Mr. Knstvold, and tried to get Mr. Virtue to the reassufacture of these combined churns and butter workers.

The Court. Such evidence as that I will admit. I think it would be better to present that evidence before presenting evidence as to the other matters.

- Q. You say that in July 1904, you were engaged in the business of manufacturing and selling combined churns and butter workers?
- A. I was.
- O. Were those made in Owatonna and sold throughout the United States in different states? A. Yes.
- Q. Do you remember the time of the beginning of these two suits against you? A. Yes, I do.
- Q. Can you give the date when the subpoenas were served upon you? A. July 16, 1904, as I remember it.
- Q. Where were you then? A. I was at Owatonna. I was in the shop.
  - O. At that time how many subpoenas were served upon you?

  - Q. Who served these upon you?
- Alady, a deputy marshall. I don't know as I can state her name just now.
- Q. Were these two subpoenas in cases one brought by the Creamery Package Manufacturing Company, and one brought by the Owatonns Manufacturing Company? A. They were.

  Q. Do you know who the attorneys in those cases were?

  - A. Paul & Paul of Minneapolis.
- Q. Prior to the beginning of these two suits did Mr. Cooper, who the testimony shows was the general manager of the Creamery Package Manufacturing Company's office at Minneapolis, call on you at Owatonna at your place of business? A. He did.
- . Q. Will you give as near as you can the date of his visit and call upon you? A. It was in the early summer.
- Q. Is he the same man who the testimony shows made a contract on behalf of the Creamery Package Manufacturing Company with Mr. Knatvold about that time?

Mr. Cohen. I object to the question as not being within the knowledge of the witness.

The Court overrules the objection and counsel for defendants excepts to the ruling.

- A. It was C. P. Cooper the General Manager of the Creamery Package Manufacturing Company in Minneapolis.
- Q. Did he have with him a copy of a contract that he wanted you to sign? A. He did.
  - Q. Did you look over and examine that contract? A. I did.
- Q. Will you state to the Court and jury what conversation you had with Mr. Cooper at that time.

Mr. Cohen. That is objected to as mmaterial and irrelevant.

The court overrules the objection and counsel for defendant ex-

epts to the ruling.

A. I can state part of it, it continued over two days or parts of two

Q. Give the conversation as near as you can.

A. He said he would make a contract with us to handle their specialties, and he also wanted us to agree to handle the creamery applies that we were handling at that time through the Creamery Package Manufacturing Company. He says to me "You are making s churn, but you had better take the Disbrow churn and make this contract with us." We took the matter up the first day, Mr. Adair my partner and myself talked it over somewhat, but we didn't consult our other partner Mr. Pound in that business. Mr. Cooper had a copy, or had the Knatvold contract with him at the time, and he said e would go and get it typewritten, which he did somewhere in the town, and the next day on considering the matter, I told Mr. Cooper that the price he had the goods listed at was more—it was a contract that, a had list price, and had a per cent discount; and I told him that contract required us to sell to creameries at a price that would be more than we were charging them at the present time, and that the price we would have to pay with the discount off, or what we would have to sell them for was more than we were selling the goods to the creameries at the present time, and that they would have to pay more; he said that they would have to pay, that they couldn't get them anywhere else.

Q. Who would have to pay? A. The creameries.

Q. And they would have to pay it to whom? A. Pay it to us. He says "We think we own he creamery supply business round here."

Q. Was there anything further, Mr. Virtue?

There was a good deal, but that is the substance of it. We concluded not to go into the contract, and not to go into the deal, and we didn't. Mr. Pound when we consulted him about it said he didn't believe that-

Mr. Cohen. We object to what Mr. Pound said.

Q. Did you enter into a contract with the Creamery Package Manufacturing Company, or did you refuse to?

A. We didn't enter into a contract.

Did you refuse to make any contract with them? A. We did. Q.

Q. What Mr. Pound said was that in the presence of Mr. Cooper?

No, I went into the other office to see Mr. Pound, I had to go and see him. Mr. Pound was not present at any of the talk with Mr. Cooper that I remember of.

Q. How long was that before the two actions were commenced,

Mr. Virtue?

A. I couldn't say just exactly; I should think it was either some time in May, the latter part of May, or it might have been in the early part of June of that year.

Q. Prior to the commencement of these two sents had any representative of the Owatoma Manufacturing Company or of the Creamery Package Manufacturing Company called on you and told you that you were infringing either the Disbrow Patent or any churn claimed to have been owned by the Creamery Package Manufacturing Company?

A. No, I don't remember of their doing so. All I heard was rum-

Mr. Cohen. I move to strike out all of the answer of the witness after the words "No, I don't remember."

The Court overrules the objection, and counsel for defendants excepts to the ruling.

Q. You say these two cases were brought together at the same

A. They were. Subpoenas were served upon me at the same time.

Q. After that time whom did you employ to conduct the defense of these two suits?

A. I employed Mr. J. F. Williamson, of the firm of Williamson & Merchant, Minneapolis, Minneapola,

Q. Did you get a copy of the complaint filed here in Winona, or did

your attorney get a copy of the complaint? A. I think so.

Q. Do you remember by whom those complaints were signed and verified, what officer on behalf of the Creamery Package Manufacturing Company, and what officer on the part of the Owatonna Manufacturing Company? A. Yes.

Q. Which one?

A: It was Mr. Frank La Bare, of the Owatonna Manufacturing Company, the president of the Owatonna Manufacturing Company, and Charles H. Higgs, the vice-president of the Creamery Package Manufacturing Company at that time.

Q. After those suits were brought and you had employed your attorney did you know of any negotiations between Mr. Williamson and Mr. Paul over the cases, as to whether there were any merits in the auits or not? A. They had meetings.

Q Did you attend those meetings? A. I don't think I did.

Mr. Williamson telephoned me once while a meeting was going on, being in Owatonna, and they being in Minneapolis.

Q. In one of those cases the question was the question of the two speeds, was it not?

Mr. Cohen. I shall object to that, because the pleadings themselves would show what the litigation was, and this is not the best evidence.

The Court sustains the objection.

Q. After these two suits were commenced did you go to New York to secure a clium or a cut of a churn, or a extalogue showing that the churn had been in use for many years prior to that time, prior to the time of the Disbrow patent or the patent rather spon which you were used, which you claimed showed conclusively that the Owntonna patent was a void patent?

Mr. Cohen. That is objected to as immaterial, incompetent and ir-

The Court. What is the purpose of this?

Mr. Leach. To show that the witness got a catalogue and brought it back, and took it to Mr. Howe, one of the directors of the Owatonna Manufacturing Company and told Mr. Howe about it, and that he had in that something which would foreclose their suit. The testimony will show that directly after that Mr. Howe went to Minneapolis, and immediately after that there was a communication received from Mr. Paul asking if they could see that catalogue; that the catalogue was turned over to these people, to Mr. Paul, and shortly afterwards Mr. Virtue had this talk with Mr. Howe about this catalogue, and we propose to show this conversation between Mr. Virtue and Mr. Howe, to as to connect Mr. Howe with this law suit.

Mr. Cohen. That is objected to as immaterial, incompetent and irrelevant.

The Court. Mr. Howe was connected with the Owatonna Manufacturing Company at that time?

Mr. Lench. Yes sir.

The Court. He is one of the defendants?

Mr. Leach. Yes sir.

The Court. I think I will allow the testimony.

Counsel for the defendant excepts to the ruling.

Q. Afterwards did you put in an answer to these two cases?

A. My attorney did:

Q. Were these two cases tried, the two cases tried and prosecuted together?

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. They were.

Q. Was there a large amount of evidence taken? A. There was.

Q. Mr. Williamson appeared for you, did he? A. He did.

Q. Did Mr. Paul appear for both the other companies?

A. He did.

Q. In the taking of the testimony was there any stipulation made that any part of the testimony which should apply to one case might apply to both cases?

Mr. Cohen. We have got the stipulation here, it is in the files of the case. I will concede that the evidence was taken tugether and that it was agreed that any part of the evidence applicable to one case might apply to the other case if RUTCHEM.

Q. Were the cases tried, the two together in that way?

1. That is the way they were tried.

Q. Were the cases argued at the same time, one right after the other? A. Yes, they were.

Q. They were argued at the same time?

A. Yes air, at the same time, but one was after the other.

Q. Were you there at the time of the arguments?

A. Yes sir, I was.

Q. Was this same evidence referred to and used as evidence in both cases at the time of the argument? A. It was.

2. It was argued before Honorable Judge Amidon, was it not?

A. Judge Amidon, yes.

Q. Whereabouts? A. In Minneapolis, in the Federal Building.

Q. You afterwards received decisions in those two cases?

A. We did.

Q. Did those decisions come at the same time?

- A. Yes, very close, one right after the other, one afternoon, as I remember it.
- Q. You heard of them both the same afternoon? It appears that in one of those decisions—afterwards, pursuant to those decisions did you enter up judgment in the case of the Owatonna Manufacturing Company a final decree?

A. Yes, afterwards there was a final decree entered, as I remem-

Q. About that time or later was there an assignment of costs from the Creamery Package Manufacturing Company to the Owatonna Manufacturing Company served upon you?

A. Yes, there was an assignment of costs made.

Q. And served upon you? A. I saw it in my attorney's office.

Q. Was that assignment of costs attached to the complaint here?

A. It is.

Q. As you understand it, they assigned the costs up to that time of the Creamery Package Manufacturing Company, the costs of that company against you, over to the Owatonna Manufacturing Company?

A.. That is the way I understood it.

O. Did you know about that original paper being filed in the files of the Owatonna Manufacturing Company's case at the court house,

d you see it there among those files?

A. I think I remember seeing it there.

Q. And after that was done did you take any steps to tax the costs the Owatonna Manufacturing Company's case, you did not, as I nderstand it, did you know anything about it?

A. Yes, I remember I think we started to tax costs, and were foretalled or something by that move. We started in to tax costs against

he Uwatonna Manufacturing Company.

Mr. Cohen. There was no paper at any time served upon you?

Q. And you say your action of that time was prevented by this ssignment.

Mr. Cohen. That is objected to as calling for a conclusion of the witness.

The Court sustains the objection.

Q. Mr. Virtue, who was there of the Owatonna Manufacturing Co., during the conduct of those suits, and during the taking of the testimony?

A. T. J. Howe, Frank La Bare, Harry Howe, part of the time,

and W. A. Dynes part of the time.

Q. Who was there of the Creamery Package Manufacturing Company? A. C. P. Cooper.

Q. Any one else that you saw?

A. Charles H. Higgs was there for a short time.

Q. Anyone else? Mr. Higgs was then president of the Creamery Package Manufacturing Company?

A. I cannot say just when Mr. Higgs became president of the

Creamery Package Manufacturing Company.

Q. Mr. C. P. Cooper was there, the manager at Minneapolis? He was their manager at Minneapolis, was he not?

A. Yes sir, he was their manager in Minneapolis.

Mr. Leach. I will state that the record shows that Mr. Higgs became president about May 1905.

Mr. Fry. 1906.

Q: Frank La Bare was president of the Owatonna Manufacturing Co.? A. He was.

Q. T. J. Howe was one of the directors?

A. Director and general manager.

Q. During the conduct of those suits, while they were going on, did you have any further talk with Mr. Cooper, this same person, in regard to this law suit or any of the law suits, or any of these transactions, Mr. Virtue? A. I did.

Q. Will you give us that conversation, please?

Mr. Cohen. I would like to have you specify the time and place.

Q. Tell us when it was.

A. Some time during the summer of 1906.

Q. Where was it?

A. It was in the Creamery Package Manufacturing Company's warehouse.

Q. What were you doing there?

A. I went over there with D. W. Ames, and Reuben B. Disbrow.

Q. Is that the warehouse in Minneapolis?

A. Yes sir, the warehouse in Minneapolis.

Q. Over which Mr. Cooper had charge? A. Yes.

Q. Did you go there to examine and see some exhibits which had been introduced in evidence in that case?

A. That was what we went there for.

Q. Did you look at those exhibits? A. We did.

- Q. Was Mr. Cooper there to show you them? A. He was.
- Q. Did you then have some conversation with regard to those lawsuits or any other law suits? A. Yes sir.

Q. Will you state what this conversation was that you had with Mr. Cooper.

Mr. Cohen. That is objected to as immaterial, incompetent and irrelevant, and not shown to be within the authority of Mr. Cooper, or as being any part of his business. This was a mere visit and examination of some exhibits, and not part of this law suit.

The Court overrules the objection, and counsel for defendants excepts to the ruling.

The Court. I understand that Mr. Cooper was their agent at that time.

Witness. Yes, he was at that time, he was manager of the Minne-apolis branch.

Mr. Cohen. May I examine the witness?

The Court. Yes.

Mr. Cohen. You had at that time some of your own exhibits stored in the warehouse of the Creamery Package Manufacturing Company?

Witness. Yes.

Mr. Cohen. Those were exhibits of churns that had been introduced in evidence by one or the other of the parties.

Witness. By both of them.

Mr. Cohen. Some by one and some by the other?

Witness. Yes.

Mr. Colien. But they were exhibits that one or the other of the parties in those two patent suits had introduced?

Witness. Yes, they were exhibits that had been introduced by the Owatoma Manufacturing Company and by the Creamery Package Manufacturing Company.

Mr. Cohen. Your sole business there was to examine those exhibits?

Witness. We went there to look at those exhibits. Mr. Cooper had charge of them and had asked to see them, and he went with us to the place where they were stored.

Mr. Cohen. You didn't go there to buy anything of Mr. Cooper that he had for sale for the Creamery Package Manufacturing Company, did you?

Witness. No, we had quit any deals quite a while before.

Mr. Cohen. Never mind about that. I asked you if you went there to buy anything of him at that time.

Witness. No air, we didn't go there to buy anything of him.

Mr. Cohen. You didn't go there to do any business with the Creamery Package Manufacturing Company other than the business you have spoken of?

Witness. We went there to look at the exhibits.

Mr. Cohen. We renew our objection.

The Court overrules the objection and counsel for defendants excepts to the ruling.

Q. Now you may state what the conversation was.

A. I told him I wanted to see a certain exhibit, and he took us up to the place, and I was pointing out certain things on the exhibit to him and to Mr. Ames and to Mr. Disbrow. He says "What is this all about?" I says "What about?" He says "About this?" I says, I told him that the testimony with regard to that exhibit was not true. Well, he says he guessed that Mr. Virtue's witnesses didn't all tell the truth. I asked him wherein they had made any misstatements, that I didn't intend to have them say anything that was not so. Well, he says, "I guess we will have to sue Virtue again."

Q. At that time did he tell you of any claim that anybody had

against you that he represented that was going to sue you on it?

A. No, he didn't say what he would sue me for.

Q. Did you ever know or hear of any claim that he had or that the company had any cause of action against you on?

A. No sir, I never heard of any.

Q: Wither the Creamery Package Manufacturing Company, or the Owatonna Manufacturing Company? A. No.

Mr. Sperry. I object to any conversation as to the Owatonna Manufacturing Company.

The Court. The objection will be sustained as to the Owatonsa

Manufacturing Company.

Q. Did you know of any claim, or did you ever hear of any claim that Mr. Cooper or the Creamery Package Manufacturing Company had against you at that time, Mr. Virtue? A. No.

Q. After the interlocutory decree was rendered, or whatever decree it was in the case of the Creamery Package Manufacturing Company, you filed an application and a motion to have it set aside, did you not?

Mr. Cohen. That is a part of the court record, and would be the best evidence.

The Court. The objection will be sustained upon that ground.

Q. Mr. Virtue, going back to the conversation between yourself and Mr. Cooper at Owatonna, what was there said in that with regard to combined cream and butter workers?

Mr. Cohen. We make the same objection, and further claim that the witness has already stated what the conversation was.

The Court. Perhaps he has. I will overrule the objection.

Counsel for defendant excepts to the ruling.

A. Well, the substance of it was that he wanted me to quit making machines and to handle the Disbrow machine in the Owatonna territory. That is what he wanted.

Q. And you refused to do so?

Mr. Cohen. That is objected to as repetition.

The Court. Yes, he has already testified to that.

Mr. Leach. I think this is all we have from Mr. Virtue upon this particular subject. The question of damages will be reserved for a later time.

The Court. Very well.

Cross examination by Mr. Cohen.

Q. Mr. Virtue, Mr. Cooper's conversation with you which you testified to here was, I think you said, not in the presence of Pound or Adair, is that right?

A. I said in the presence of Mr. Adair, but not in the presence of

Mr. Pound, as I remembered it.

Q. Adair and Pound were your partners were they not?

A. They were, and they are at the present time.

Q. They were not stockholders, were they, in the Owatonna Fanning Mill Company? A. No, they were not.

Q. You said that the assignment of costs came to your knowledge in some way, you said something about its forestalling the taxation

at that time, that you were getting ready to tax your costs, but had not taxed them, is that right?

A. I think we never did tax the costs.

Q. You never did tax the costs? A. No, sir.

Q. And if you made any preparation before you didn't go on after that? A. No.

### MARTIN DEEG,

a witness produced and sworn on the part of the plaintiffs, testifies as follows:

### Examination in Chief by MR. LEACH:

Q. You are the Martin Deeg, who was the one that joined with Mr. Virtue in the patent known as the two roller?

A. Yes, sir, I am.

Q. You live at Owatonna? A. Yes, sir.

O. Are you the same Martin Deeg that made a contract with the Creamery Package Manufacturing Company, and the Cornish, Curtiss & Greene Company in 1900? A. Yes, sir.

Q. You still own a half interest in that patent, do you? A. Yes, sir.

During the period from 1899 up until 1905, did you have negotiations and talks with the officers of the Creamery Package Manufacturing Company, and also negotiations and talks with the officers of the Owatonna Manufacturing Company, regarding the sale of the Deeg patent? A. Yes, sir.

Q. Will you state about what time the first conversation was.

A. The first was with Mr. T. J. Howe, the president of the Owatonna Manufacturing Company, not president, he was manager I think, it was T. J. Howe of the Owatonna Manufacturing Company.

O. Was that concerning the sale and purchase of that patent?

A. Yes.

- O. Where was that talk had? A. It was in Owatonna on the street.
- Q. During that time were you trying to sell your patent, or trying to get some one to take it up and manufacture the churn?

A. Not at that time, no, sir.

Q. Were you trying to make negotiations with that company at that time? A. No, sir.

O. What was your business at that time?

A. I was working for the Owatonua Faming Mill Company.

Q. What was your talk with Mr. Howe at that time concerning your patent?

MR. COHEN: That is objected to as immaterial and irrelevant. I think I may say that the two roller patent so called, and what we call the Virtue-Deeg patent have nothing to do with our transactions here.

THE COURT: Is this for the purpose of going into this contract Exhibit "C" of the complaint?

MR. LEACH: No, sir, during the negotiations leading up to that contract and also subsequent to that time negotiations for the sale of that patent were had, and there were certain talks and conversation had. This is not for the purpose of showing what took place on that portion which has been ruled out.

THE COURT: I think I will allow him to go on for the present.

Counsel for defendants excepts to the ruling.

Q. Tell us about the conversation with Mr. Howe which you had at that time. A. You mean what we talked about?

Q. Yes.

A. I met Mr. Howe on the street, and he stopped me and said "Oh, Martin, he always called me Martin," he say "I understand yau are going to take out a patent." "Yes," I says, "Yes, I am making an application for a patent." He says, "What are you going to do with it? You cannot use it, the patent isn't any good because we owned the two speed plan and the churn can't be made without two speeds, and we owned the two speed patent." I said "well Mr. Howe, we will get over that difficulty." That is all that was said and he went into the office, it was right close to the office.

Mr. Cohen. I move to strike out the conversation as immaterial and irrelevant.

THE COURT grants the motion.

- Q. After that time you made this contract. Was it after this conversation you made the contract, or before?
  - A. After, we made the contract after.
- Q. Now after you made that contract did you have any talk with Mr. Gates who was then the president of the Creamery Package Manufacturing Company. A. Yes, sir.

Q. During the year 1901? A. Yes, sir.

Q. What position did Mr. Gates occupy with the Creamery Package Manufacturing Campany? A. I think he was president of

the company, I think so.

Q. Were you then trying to negotiate with the Creamery Package Manufacturing Company for the sale of your patent to that company? A. Yes, I was.

Q. Did you take up that subject with Mr. Gates? A. Yes, sir.

Q. Where were you talking to him?
A. In his private office in Chicago.

Q. How did you happen to be down there at that time?

MR. COHEN: That is objected to as immaterial and irrelevant.
THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. I had a contract with the Cornish, Curtis & Green Company

of Fort Atkinson, Wisconsin to build the machine.

THE COURT: State briefly why you went to Chicago at that time.

A. I went to Fort Atkinson, and I was sent from Fort Atkinson to Chicago.

Q. Who sent you there? A. Mr. Swasee.

Q. Was he the manager of that concern there?

A. Yes, sir, the Cornish, Curtis & Greene Co., of Fort Atkinson.

Q. Will you state what time it was that you went to Chicago and had this talk with Mr. Gates.

A. That was in December, 1901.

Q. Was that concerning the sale of your patent to the Creamery Package Manufacturing Company. A. Yes.

Q. Will you please tell us what that conversation was.

MR: COHEN: That is objected to as immaterial and irrelavant.

THE COURT overrules the objection and counsel for defendants excepts to the ruling.

A. Why, I says "Mr. Gates, I come down here to see what we can do about the patent, about the contract we have. Are you not going ahead to build the machine? I would like to sell you my right in the patent." Why Mr. Gates says, "They tried your machine up at Fort Atkinson after you were gone, and it broke and they left it broke, and there was nothing to it; they thought it was not a practical machine." He says "We are selling the Disbrow churn and we are selling the Victor churn, and that is all the machines I care to handle; so now if they are not satisfied with the Victor machine they can have the Disbrow machine, and if they are not satisfied with the Disbrow machine they can have the

Victor." I says "I have done considerable work with the Owatoma Manufacturing Company to get this combined churn and butterworker in the market, and I have made the patterns and I would like to make something out of the patent. If I can't get anything out of my patent I would like to get something out of the Disbrow patent, because I was working for them and they promised me extra wages. I was getting 20c an hour making the patterns and they claimed that after they got the machine in the market I would get better pay, when they could go on and self the machine."

MR. COHEN: I object to this.

Q. Are you now stating the conversation that took place between you and Mr. Gates?

WITNESS: Yes, sir.

MR. COHEN: You are not going back into ancient history, are you?

WITNESS: No, sir. But they failed to do that.

Q. Limit yourself to what Mr. Gates said and what you said. A. I said I would like to get something out of the deal, out of the patent, or to get some money out of the Disbrow patent. Well, Mr. Gates says "Mr. Deeg, I will give you an advice. If you go ahead and build your own machine you will have a law suit." And then he says, "You have got a partner, his name is Virtue" and he says "If he builds a churn we will put him against the wall. I give you advice, you go back to Owatonna, and we will make you an offer for your patent." I says "All right, Mr. Gates, I will take your advice." Mr. Gates said "Wait a minute," and he sat right down and wrote a letter.

Q. Whom did Mr. Gates say you were to see at Owatonna?

A. Mr. Howe, Mr. T. J. Howe, he says see Mr. T. J. Howe. He says "You go back to Owatonna to Mr. T. J. Howe, and he will make you an offer."

Q. Did he give you a letter to take to Mr. Howe?

A. He sent Mr. Howe a letter, I seen him seal it.

Q. Did he give you the letter? A. He did not give me the letter.

MR. COHEN: I move to strike out the conversation as given by the witness.

The Court overrules the objection and counsel for defendant excepts to the ruling.

Q. Did you see him write a letter to Mr. T. J. Howe?

A. Yes, sir.

Q. What did he say about writing a letter to Mr. Howe? What did Mr. Gates tell you about writing a letter to Mr. Howe?

A. He was going to write a letter to Mr. Howe, that Mr. Howe should make me an offer for the patent.

Q. Was there any further talk at that time with Mr. Gates?

A. No, sir, there was not.

Q. What did you do, where did you go from there?

A. I went back to Owatonna on the evening train, that same evening.

Q. What did you do the next day?

MR. COHEN: That is objected to as immaterial.

- Q. Did you see Mr. Howe soon after that? A. Yes, sir.
- Q. How long after that? A. I think it was the next day.
  Q. Did you go there under these instructions that you received from Mr. Gates? A. Yes, sir.
  - O. Where was Mr. Gates? A. He was in the offce.

Q. Did you ask Mr. Howe if he received that letter?

A. Yes, sir.

Q. What did he say? A. He did he said. He said he might just as well have saved that—

MR. COHEN: That is objected to.

O. Where did you see Mr. Howe at that time?

A. Right in the office of the Owatonna Manufacturing Company.

Q. He was in their office, was he? A. Yes, sir.

Q. Did you have any further talk with him at that time?

A. Yes.

Q. About the same subject that you had with Mr. Gates before that? A. Yes, sir.

Q. And about the subject concerning which Mr. Gates sent you

to Mr. Howe? A. Yes, sir.

Q. Now, will you please give us the talk that you had with Mr. Howe?

MR. COHEN: That is objected to as immaterial and irrelevant.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. I asked Mr. Howe if he did get a letter from Mr. Gates from Chicago, and he said yes, it must have been on the same train you came up on. He says he might as well have saved two cents and put the letter in your pocket. I says "Well, Mr. Howe, what is the offer?"

Q. You said that to Mr. Howe? A. Yes, sir, I said "What is the offer"? He says "I have got nothing to offer, your patent is no good, you cannot use the two speed, we own the patent on the

two speeds". Can I go further in that conversation?

Q. Was there anything more?

A. Why I says that he didn't have the two speeds, I found that there is a firm down in Wisconsin, F. B. Fargo, and they are using the two speeds. He says "They are paying a royalty", and then I says "Why can't I do that too and go to work on my machine, why can't I build my machine and pay a royalty?" He says "No, sir". I says "Mr. Howe, I don't think you get any royalty, because I was down at Fort Atkinson, and saw F. B. Fargo and had a talk about that, and he says "they are not paying any royalty on the two speeds." I told Mr. Howe that and then Mr. Howe turned round and said he couldn't do it, that he gave them permission to use it.

Q. Anything further? A. That is all.

Q. Was there anything said at that time about your manu-

facturing or using your own churn? A. No, sir.

Q. After that time did you ever have any conversation with Mr. Higgs concerning the sale of your patent to the Creamery Package Manufacturing Company? A. Yes, one time.

Q. About when was that? A. In 1905.

Q. What was Mr. Higgs at that time?

A. I think he was president of the company.

Q. Where did you see him? A. At Chicago.

Q. In what office? A. In his private office.

Q. Was that the office of the Creamery Package Manufacturing Company? A. Yes, sir.

Q. You knew where they were located, did you? A. Yes, sir.

Q. Did you go there at that time to make some disposition of your patent to the Creamery Package Manufacturing Company?

A. Yes, sir.

Q. Can you tell about what time of the year that was?

A. It was in the spring about March I should think; I am not positive, but it was early in the spring.

Q. How long was that after the conversation you formerly

had with Mr. Howe? A. Why, it was a year after.

Q. You say you were there to sell your patent to the Creamery Package Manufacturing Company?

A. Yes, I was trying to make a sale to them to get some money out of it.

Q. Did you then have any patterns which went with your patent? A. Yes, air.

Q. For the making of a churn under the patent? A. Yes, sir.

Q. Where were they? A. I had them, it was in Owatonm. They were over here in Owatonna.

Q. Did you have a conversation there with Mr. Higgs at that time and place concerning the sale of your patent to the Greamary Package Manufacturing Company? A. Yes, air.

O. Will you please tell us that conversation?

A. I said "Mr. Higgs, I have come down to see what you can do about our patent."

MR. COHEN: That is objected to as immaterial, and irrelevant.

The Court overrules the objection and counsel for defendant ex-

cepts to the ruling.

WITNESS: I said "I have made new patterns and new improvements, and they ought to be patented, but I will turn them in provided I can make a sale of patent No. 364,074, the patent with two rolls, reversing rolls." He says, "Don't you know there is a suit pending in court about the two speed?" I says, "Yes, but I think we can get out of that all right, I think we can beat that two speed patent." He says, "I don't know about that, we will have to wait until the court gets through", and further more he says, "We don't care to buy any more patents, we own the Disbrow patent and we own the Victor patent, and we own so many patents that we own enough patents to make anybody trouble that goes to work and puts up a combined churn and butter worker." Then he says, "Mr. Gates says if you get rid of your partner we might make a deal; what will you take for your patent?" I says, "I will take \$50,000." He laughed at me and he says "I wouldn't give you 50 cents."

Q. Was there anything further? A. I says "I can't sell it,"

and I went off, went away.

Q. You say Mr. Higgs said that if you got rid of your partner then he might buy it? A. Yes, might make a deal.

Q. Who was your partner that he referred to?

A. It was Mr. Virtue.

Q. Mr. D. E. Virtue here? A. Yes, sir.

O. And that conversation was had with Mr. Higgs?

A. With Mr. Higgs, yes.

Q. After that time did you have another conversation with Mr. Howe about that matter?

A. No, not right then, I don't remember now, I was not to work for him then, I worked for him after that, I used to work for the Owatonna Manufacturing Company.

Q. Did you have a conversation with him at some time about

that?

A. I worked for him at the time the decision came out about

the two speeds, that anybody could use the two speed combined churn and butterworker. I asked Mr. Howe about it, I said "What

are you going to do about it now?"

Q. Did you have a conversation with Mr. Howe at any time in regard to the two suits which had been brought against Mr. Virtue, in regard to the outcome of those two suits, how they would probably come out?

A. Why, I had a conversation with Mr. Howe, it was in 1904,

about that, 1904.

Q. Where was Mr. Howe at that time?

A. He was right in front of his office, and he called me over. I was going up the street, going to the shop to work, and he called me over to speak to me.

Q. That was in 1904? A. 1904.

Q. Give the substance of that conversation.

MR. COHEN: That is objected to as immaterial and irrelevant, and as not binding upon the Creamery Package Manufacturing Company.

THE COURT: I will sustain the objection as to both defendants.

Q. Were you then conducting any negotiations with the Owatonna Manufacturing Company? A. No, sir.

Q. It was just simply a talk that you had on the street.

A. Yes, sir.

Q. During that period did you have any conversation with the defendant Frank La Bare?

A. What time do you refer to?

Q. I mean during the pendency of the two cases against Mr. Virtue. A. In 1894?

Q. Yes. A. Yes, sir.

Q. Where was that talk?

A. It was at the shop where I work.

Q. What shop was that?

A. Hammel Bros., contractors and builders.

Q. What was the conversation?

A. He brought the news to me that he had sued Mr. Virtue.

MR. COHEN: That is objected to as immaterial, and irrelevant, and as not binding upon either of the defendants.

THE COURT: I will sustain the objection.

MR. LEACH: I would like to call the attention of the Court to the fact that Mr. La Bare is one of the defendants in this case.

THE COURT: I had overlooked that. Then the objection will be sustained as to all the defendants except Mr. La Bare.

Q. What was the conversation that you had with Mr. La Bare?

A. He says, "We have commenced suit against Virtue on account of the two speed." I was making the patterns at that time for a new machine. When I said that he says, "You might just as well throw them away, they are no good to you. We have just commenced suit against Mr. Virtue on the two speed."

Q. Anything further?

A. I says, "I think Mr. Virtue is going to win out."

Q. What did Mr. La Bare say?

A. "Well," he says, "it takes lots of money."

Q. What else? A. That is about all I can remember.

Q. Can you tell anything more he said to you or that you said to him?

A. Why no, not now, it is so long, I have forgotten. We had

more talk about it, but I couldn't state it.

Q. Did you have any talk with Mr. Gates further than you have testified to, at some other time than the time testified to

before, at Chicago? A. No, sir.

Q. When you were down there talking with Mr. Higgs in regard to the sale of your churn, or with Mr. Gates, did he say anything as to what they would do providing anybody went into the churn business?

MR. COHEN: That is objected to as immaterial and irrelev-

ant, and also as leading.

THE COURT: I think the objection should be sustained. The witness stated he had given all the conversation as far as he could remember.

Q. Can you give any other conversation you had with Mr. Gates? A. No, sir.

Q. Or with Mr. Higgs? A. No, sir.

Q. Or with Mr. Howe or any of those people?

A. With Mr. Howe I had a good many; pretty near every day when I was working for him.

# CROSS EXAMINATION.

# By MR. COHEN.

Q. These conversations took place a good many years ago,

did they not? A. Yes, sir.

Q. You didn't testify to these talks until a good many years after they occurred, isn't that true? You didn't give any testimony about any of these conversations until a long time after they happened, isn't that right? A. I did.

Q. When was it you first testified about any of these talks?

A. At Owetonna.

- Q. When? A. A year ago.
- Q. A year ago? A. Yes, sir, it was in the fall.

Q. A year ago last fail?

- A. Two falls next year, two years this fall.
- Q. Two years this fall? A. Yes, sir.
  Q. That was the first time? A. Yes, sir.
- Q. Then it was in 1907 when you began to testify about these conversations? A. Yes, sir.
- Q. It was in a suit that you yourself had that you testified, was it not? A. I don't understand that.
- Q. When you gave that testimony the first time in Owatonna in the fall, it was in a suit that you and Virtue had against the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company, was it not? A. Yes, sir.

2. It was a suit in relation to these very patents owned by you

The state of the s

# MD COURSE I will mithdean that question

Q. The suit in which you gave your testimony at Owatonna in the fall of 1907, was a suit brought by you and Virtue against the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company, isn't that right? A. Yes, sir.

Q. The first suit that you testified in was not your own suit at all, but the first suit was a suit by Mr. Virtue and the Owatonna Fanning Mill Company, or don't you remember that?

A. I thought it was mine, I thought it belonged to me.

St. You had another one. You had a good many of them?

MR LEACH: I more to strike out that question.

### The Court Counts the motion

Q. In the fall of 1907, when you began, or when you repeated that conversation that you first had with Mr. Gates, did you say anything at all the first time that you repeated it, about Gates saying that he would push Virtue to the wall? A. Yes, sir.

Q. Don't you remember, Mr. Deeg, that when you first went on the stand and told that conversation, you didn't say anything about it, didn't say anything about Gates saying that he would push Virtue to the wall?

MR. LEACH: That is objected to as being an assumption.

The Court overrules the objection.

Q. Don't you remember that afterwards, the court adjourned, and the next morning you came in and you said you had remember-

ed something more, do you remember that? A. Yes...

Q. And don't you remember now that the thing you remembered over night was what Gates said, isn't that so?

A. It came to me, yes.

Q. It came to you after you testified the first time?

A. I thought it over, because it had been so long. I takes

time to get your memory together.

Q. But you got your memory together after thinking it over over night. Then you first remembered what Mr. Gates had said, isn't that right? A. I had it in my mind, but I didn't know just exactly what it was.

Q. You had it in your mind? A. Yes.

Q. But you didn't know just exactly what it was? A. No.

## JAMES F. WILLIAMSON.

A witness produced and sworn on the part of the plaintiffs, testifies as follows:

#### EXAMINATION IN CHIEF.

By MR. LEACH.

Q. You are the attorney who appeared for Mr. Virtue in the two suits which were brought against him, one by the Owatonna Manufacturing Company, and one by the Creamery Package Manufacturing Company? A. Yes, sir.

Q. Your employment by him in those two suits began about

when?

A. Very soon after the subpoenas were served upon Mr. Virtue. I couldn't give the exact dates without referring to the record. It was some time before it was necessary to make an appearance in response to those subpoenas.

Q. You received both the subpoenas at the same time?

A. Yes, sir, Mr. Virtue delivered them to me at the same time. He had them with him when he came to my office and retained me.

Q. After that was there any talk between you and Mr. Paul before you put in an answer, with reference to any negotiations concerning the merits of either one or both of these suits brought against Mr. Virtue? A. There was.

Q. For about how long a period did these talks or these nego-

tiations extend?

A. I can't give the exact length of time. I can state the cir-

cumistances. I should think it was-

MR COHEN: That is objected to. The witness was asked to give the time and not the circumstances.

WITNESS: I should think several weeks, two or three weeks.

Q. Did those talks embrace both those suits? A. Yes, sir.

Q. During those negotiations with Mr. Paul did you produce other letters patent which had been issued prior to their patent to Mr. Paul, for his inspection? A. I did.

Q. You may tell in short what was done in those negotiations.

MR. COHEN. That is objected to as immaterial and irrelevant.

THE COURT: What is the purpose of this?

MR. LEACH: To show that the two actions were prosecuted really as one, and that during the prosecution of them there were frequent consultations between Mr. Paul and Mr. Williamson, and one in which Mr. Howe took part; that there were frequent consultations between Mr. Paul and Mr. Cooper in regard to the two suits, and that Mr. Cooper was there and took part in the taking of the testimony while the testimony was being taken, or some of it which applied only to the Owatonna Manufacturing Company case: that shortly after the cases were commenced, and before the answers were put in, after they had been discussing the question for some time as to whether there were any merits in the conduct of the actions. Mr. Paul was undecided apparently as to whether he would continue the actions, and there was an agreement made between Mr. Paul and Mr. Williamson, and the statement made by Mr. Paul to Mr. Williamson that he Mr. Paul didn't know whether he would continue the suits until after he had gone to Chicago and consulted his clients, meaning the Creamery Package Manufacturing Company; that that afternoon Mr. Paul went to Chicago, and the next morning Mr. Williamson received a telegram from Mr. Paul to the effect "We will go ahead with both. suits." This is offered to show the connection between the Owatonna Company and the Chicago Company in what we claim was a joint presecution of these two suits.

THE COURT: I will admit evidence showing that these two mains were carried on together.

Counsel for defendants excepts to the ruling.

MR. COHEN. I will be willing to let the records stand as Mr. Leach has now stated it, as to what he proposes to show by Mr. Williamson, because I apprehend that the question cannot be determined at all upon that point.

THE COURT: The serious question to my mind is this: Admitting all that is alleged in the complaint as to the existence of an illegal contract or a monoply, are the damages such damages as resulted from the contract which was in restraint of trade, or did they result from some other cause which had no necessary or natural connection with this feature of the contract? In other words, must the damages which a private person can recover be the damages which flow from that feature of the contract which is n restraint of trade, or can he recover such damages which a person may suffer outside of that. After this illegal contract was made, and I will assume in connection with that that the contract was in violation of the Act and resulted in damages to the plaintiffs, are those damages such damages as are referred to in this Act, and for which the plaintiff can recover? If not, it is about as much as saying that the complaint does not state a cause of action; but admitting that, it does state a cause of action, are the damages such as would naturally and ordinarily flow from that cause of action?

Mr. Leach: We were trying to show that the prosecution of

these two suits was a part of the conspiracy.

THE COURT: I will admit evidence tending to show a combination between these two companies for the purpose of carrying on these suits, and I will leave for further consideration what the effect of that would be.

MR. COHEN: My suggestion was that if we admit all that is offered to be proved by counsel, still it would not affect the ultimate question. We are willing to concede for that purpose that Mr Williamson would testify as stated in the offer of Mr. Leach.

THE COURT: I think we had better go ahead with the evidence.

- Q. After these suits were commenced did you have more talk with Mr. Paul about the continuing of these suits? A I did
  - Q. As to whether the suits had merit or not? A. I did
    Q. Was that conversation with regard to both suits?

A. It was.

Q. During that time you showed him certain patents, did you?

A. I did.

Q. Will you tell us what they were and all about it?

A. I will state the circumstances as they were: After the patent suits had been begun in the usual way, and I had been retained in the case, I had done what we always do in such cases, to-wit: have a careful search made of the prior art; by that I mean search for and compare the prior patents and publications.

consecuting this bind of a muchine, a combined churn and butter-worker. As the result of that I also augmented to Mr. Virtue the careful investigation should be made as to what prior muchines if any, had gone into public use prior to the date of this patent, id the inventions set up in them. He had gone down to the state w York and had brought back and delivered to me what he had found there, and he showed me a catalogue illustrating the hind of goods that were made there and sold. As the result of that investigation and what I had made, I found a prior state of the art, which is my judgment-

MR COHEN . That is objected to.

WITNESS: Before I filed the answers I either saw Mr. Paul or telephoned him, after speaking to Mr. Virtue, and asked him whether he would care to see what I had found and proposed to set up in the answers, as anticipating the patents in suit, in my judgment. I told him that in my judgment he ought to see it, and he said he would consult his elient and let me know. Later he either telephoned me or told me in person that he would like to see them. He then came into my office and I showed to him some of these prior patents which my search had developed, and also this Penner catalogue of combined churns and butterworkers which Mr. Virtue found had been made and sold in New York state. We had some conversation there. I said in substance "Here are these, and I would like to have you look them over if you wish to do so. I don't are there would be any use in going on with these suits, we would simply bust up all these patents and throw the whole thing open to the public." He said he would look them over, and he did look them over there. He asked permission to take some of them with him, and he took some of them with him. He didn't say-before he went away I asked him whether or not he would give me any idea as to what he thought about it. He says, "I must go to Chicago first, I must consult with my clients first about the matter, and then I will talk to you or let you know." There was considerable conversation, more or less conversation about these patents and as to what they showed. He gave no further statement as to what he would do. There was then a delay of some days. It was getting near my time when I would be obliged to file the answers in these suits. I telephoned from I think, or wrote him and asked him whether he was ready to say what he proposed to do. He said he was not, but would go to Chicago

every in the near fature.

| Win tile talk which you had with Mr. Paul with regard to the specify.

ence of Mr. Frank I's Bare, and I think some of it in the presence of Mr. T. J. Hower Any how I talked with Mr. T. J. Howe; Mr. T. H. Howe came to see me about the matter before Mr. Paul gave his answer as to what he proposed to do, and these same patents and that Fenner catalogue were shown to Mr. T. J. Howe, and to Mr. Harry J. Howe. Mr. Howe asked me to explain the patents to him, and I did.

Q. What patents did you explain to him?

A I explained and showed him this Fenner catalogue, and I called his attention to the cuts, and explained in a general way as to the manner in which the machine was used, and I called his attention to more or less of the prior patents which showed in my judgment—

MR COHEN: That is objected to.

Q. What did you say to Mr. Howe?

MR. COHEN: I object to the witness stating what he said to Mr. Howe.

THE COURT: He may state what he said to Mr. T. J. Howe.

Q. Was it Mr. T. J. Howe, or Mr. Harry Howe, which was it?
A. I told Mr. T. J. Howe, they both came together, but Mr.
T. J. Howe did the talking.

Q. Your conversation then was with Mr. T. J. Howe, the older

mani

A. Yes, sir, I know him very well. He came into my office and said he was an officer of the Owatonna Manufacturing Company, and he would like to see what I had found relating to the suit which they then had against Mr. Virtue. This was subsequent to the offer which I had made to Mr. Paul.

MR COHEN: What do you mean by the offer?

WITNESS: I offered to show him the prior art which I had developed.

MR COHEN: You offered to show him the patents? WITNESS: Yes, sir, and these prior publications.

Q. Go on please.

A. Mr. Howe asked to see these patents after he told me who he was. I showed him these prior patents and the Penner estalogue, and explained them to him. He said something more about it, he said he would take them and consider them. I think I asked him whether he would go on with the suits or not; "Well," he says, "I will have to consult with the others about that, I won't decide that now, but I will think it over and talk it over later and let you know, or Mr. Paul will let you know."

Q. Then what? A. Then Mr. Howe went out.

5. I understood you to say that at that interview Mr. T. J.

Howe and his son came in together.

A They both came in together. Then Mr. Howe, the old gentleman came back and we talked about the same matter; but whether I gave him the patents in the first interview, or the second time when he came in to see me about it, I don't remember now; but in one of these two interviews I showed him the Fenner catalogue, and showed him some of the patents. I think I gave him one of the Fenner catalogues to take with him.

Q. At the last talk you had with Mr. Paul, had he made up

his mind whether he would go ahead with the suits?

A. Well, he told me that he had not, but he would have to go to Chicago and consult his clients about it, and then he wrote me a letter.

Q. When he said he would have to go to Chicago to consult his chents, did he say what clients he referred to, or did you know? MR COHEN: That is objected to.

Q. Did he say what clients he referred to?

MR COHEN: Did he, or did he not? Please answer yes, or no.

A. My recollection is that in some of these interviews he said he would have to consult with the Creamery Package Manufacturing Company.

Q. You knew very well whom he meant by his clients?

A. I did.

Q. You knew it was the Creamery Package Manufacturing Company? A. It was.

Q. Now, shortly after you had that talk did you receive this letter from Mr. Paul, dated Minneapolis, Minnesota, October 17, 1904, which I will have marked as an exhibit?

Said letter is now marked Plaintiffs' Exhibit P-6.

A. Yes, I recognised that as Mr. Paul's handwriting. I received just such a letter; I think that is the identical letter.

MR LEACH: We will offer in evidence Exhibit P-6.

MR. COHEN: That is objected to as immaterial, and incompetent and not within the authority of counsel.

The Court overrules the objection and counsel for defendant excepts to the ruling,

Exhibit P-6 is read to the jury by Mr. Leach.

Q. Afterwards did you receive from Mr. A. C. Paul, this telegram which I will have marked? A. Yes, air, I did. Said telegram is marked Plaintiffs' Exhibit P-7.

Q. How long was it after you received the letter before you eccived the telegram, if you can tell?

A. I should say, as shown by the dates, the letter is dated October 17th, and the telegram is dated October 20th.

Q. You know the time that Mr. Paul went to Chicago on that.

occasion ?

A. He told me over the 'phone that he was going, and this letter followed about the same time.

MR. LEACH: I will offer in evidence Exhibit P-7.

MR. COHEN: I will make the same objection to this that I made to the letter Exhibit P-6.

The Court overrules the objection and counsel for defendant excepts to the ruling.

Exhibit P-7 is read to the jury.

Q. Was that the end of your negotiations? A. Yes, sir.

Q. Did Mr. Paul state whether he would go ahead with one suit, or both suits, or any suit?

A. It was, I understood from that that he would go ahead with

both suits. I prepared my answers in both suits.

Q. During the pendency of that suit was there a very large amount of testimony taken?

A. A very large amount, yes, sir.

Q. Whom did you see there from the Owatonna Manufactur-

ing Company?

A. Mr. Frank La Bare was usually present; Mr. Thomas J. Howe, the old gentleman was there more or less, Mr. Harry Howe, his son was there more or less, and Mr. Dynes, I don't know his initials, he was there on one or two occasions.

Q. Was he connected with the Owatouna Manufacturing Com-

pany? A. I heard him testify so.

O. Was that the same Mr. La Bare, who we have had here?

A. Yes, sir.

Q. Frank La Bare, one of the defendants in this case?

A. Yes, sir.

Q. Who was present on behalf of the Creamery Package Man-

ufacturing Company?

A. Mr. Cooper the manager of the Minneapolis branch of the Creamery Package Manufacturing Company, I don't remember his initials. He was there nearly all the time or a great deal of the time. Sometimes he was not present, and Mr. Higgs.

Q. C. H. Higgs?

At I think those are his mittale. I don't know of any own know-ge. He was present on two or three occasions, but not for any creat length of time at any one time, as far as I can recollect.

Who elle?

Mr. McNing fared Acadian is hink they called him, was

A. Mr. McNish. Fred McNish. I think they called him, was present on two or three occasions, but he was not there for any great length of time. Enoch J. Fargo was present during all the examinations that took place at Lake Mills. Wisconsin.

Q. Was there a part of the time when you were taking the testimony to apply in the suit brought by the Owatonus Manufacturing Company which had no reference to the suit brought by the ceamery Package Manufacturing Company? A. Yes, ar.

Q. During that time you may state whether or not Mr. Cooper was there attending to the taking of that testimony.

All was more or less of it. I would have to get the record.

I wouldn't be able to supply the particular dates, unless it shows Q. Life you we consultations held by those people and their

stiorney Mr. Paul?

III. COMEN: Between whom?

MR LEACH Mr. Dynes, La Bare, Cooper and Higgs.

A. I saw Mr. Paul consult with Mr. Cooper very frequently during the conduct of these examinations in both suits, and I saw him frequently with Mr. Thomas J. Howe when he was there, but he true not there as much as Frank La Bare. I saw him consult frequently with Frank La Bare in the taking of testimony in both

(). Did you see him consult with Mr. Cooper when you were taking testimony which applied only to the Owatonna Manufacturing Company.

I did at times when we were taking testimony which my recollection is only applied to one case

Q. Did you see those people in consultation and talking Mr. Cooper, Mr. Paul, Mr. Howe and Mr. La Bare?

A. They appeared to be, as far as I could judge. They would hold consultations. They would go off to consult, or go into an

Q. You are an attorney and counsel in this case, is there any more that you deafre I should sale you about upon this case, A. Not at this state.

deal' timb of any to die just at this essente. Scholar were readered, such as have been spot-

Mistalle

en of here, did you see an assignment of costs made from one to the other? A. Yes, sir, I did.

Q. What was that?

A. It was a paper purporting to be-

MR. COHEN: I object to the witness stating the contents of that paper, it being part of the records.

Q. Where did you see that paper?

A. I saw it in the files of the Owatonna suit, the suit wherein the Owatonna Manufacturing Company was complainant, in the possession of the clerk of the court.

Q. In Rehible E-4 attached to that complaint, the assignment

mear as you can recollect, it being admitted that that assign-

ment was executed at that time?

A. I should think this was a copy of that instrument.

Q. What had you done in the way of preparing to tax costs before receiving notice of that amignment?

MR COHEN: That is objected to as immaterial, and irrelevant

The Court overrules the objection and counsel for defendant excepts to the ruling.

A. I think we were just getting ready to make out our schedule of costs and make a motion for taxation of costs, but we had not filed our motion.

Q. After that assignment had been served did you proceed with the taxation of costs? Or did you drop the taxation of costs?

A. I did nothing further until Mr. Paul filed some motion in that suit respecting the taxation of costs. I would like to see the motion, I have forgotten just how it is worded. I immediately filed another motion asking that the question of taxation of costs should be postponed until after the accounting. Nothing as to that could be done, as Judge Lochren was taken ill and could not attend to business, and we got into that condition that we had no judge to whom we could apply for hearing this motion, and it went by without either of these motions being heard, and they stand on the record today.

Did you tax the costs in that case? A. I did not

art here book a recess until 2 p. m. the same days at which time the case is proceeded with as follows:

MR REIGARD: With reference to Exhibit Dig objection was ade to it on the ground that it was not certified copy; since that time we have found that it is certified copy. I would arge our former objections, but I will withdraw the objection that it was

not a certified copy.

#### I. F. WILLIAMSON.

Tukes the stand for

#### CROSS EXAMINATION.

WITNESS Before the cross examination begins I would like to ask the reporter to read the very last part of my statement in which I referred to the taxation of costs. Or I will say there was a notice served upon me by Mr. Paul to the effect that he would move for taxation of costs in the suit wherein the Creamery Package Manufacturing Company was complainant, and the motion which is on file on the part of the defendant was in that case for an order postponing the taxation of costs until after the accounting should be made and completed before the master. There is one thing which has occurred to me since I left the stand that might possibly be material; another conversation took place between Mr. Paul and myself regarding the conduct of these suits at a later stage.

MR. COHEN: We would greatly prefer that questions should be asked the witness, or you can ask the question yourself if you desire.

MR LEACH: After the testimony was in in the suit brought by the Owatonna Manufacturing Company, and you rested your case, did you have some talk then with Mr. Paul as to the conduct of that case?

WITNESS: I did.

MR. LEACH: Where was that and when was it?

WITNESS: It was in my office at the very time that we took our last testimony on what was called the two speed case, where the Owatonna Manufacturing Company was complainant.

MR LEACH: State that conversation.

MR COHEN: I wish to object to this question, on the ground that it is immaterial, and irrelevant, and because no authority is shown on the part of Mr. Paul to bind the parties at that time.

The Court overrules the objection and counsel for defendant excepts to the ruling.

WITNESS: Mr. Paul stood there looking at the Moorehouse combination concerning which testimony had been taken; and

somebody, I don't remember just who, asked Mr. Paul "What are you going to do about rebutting this testimony?" Mr. Parl didn't answer, but stood there looking at that exhibit, and I stood watching him, and directly I burst out laughing and said "Mr. Paul, is there anything you can rebut?" Then Mr. Paul smiled and then reddened, and he says "Well, you will have to fight us in the Court of Appeals anyhow, you will meet us in the Court of Appeals."

MR. COHEN: To ve to strike out the testimony of the witness as to the approace of Mr. Paul, as not being a part of the conversation.

The Court overrules the objection and counsel for defendant excepts to the ruling.

#### CROSS EXAMINATION.

By MR. COHEN.

A certain paper is now marked Defendants' Exhibit D-3.

Q. Mr. Williamson I hand you now Defendants' Exhibit D-3 and ask you whether that is the stipulation that was made with regard to taking the testimony in both suits.

A. Yes, sir; there was an additional stipulation made on

the record later, but this is the general stipulation.

Exhibit D-3 is now offered in evidence by counsel for defendants, received without objection and read to the jury by Mr. Cohen.

Q. Evidence was taken in those two suits from time to time

at different places, was it not? A. Yes, sir.

Q. This stipulation that I have just called your attention to was made before any evidence was taken, was it not?

A. I think it was.

O. It is dated December 12, 1904.

A. I think that is the date.

Q. That stipulation continued to govern the matters therein referred to until the end of the proceedings? A. Yes, sir.

Q. When you say that some representatives of the Owatonna Manufacturing Company were present when the testimony was taken that related to the Creamery Package Manufacturing Company case, that is your judgment, the judgment that you made of the testimony that was then taken that it had no relation to the other case, that is your judgment of it, is it not?

A. Yes, sir, that is my judgment.

O. And that was your judgment? A. Yes, sir.

Q. Still, under this stipulation, if the Court should have decided afterwards that it had relation to the other case, or the case in which it was not taken, then it might be used and admitted in

this case as well? A. Certainly.

O. That is true, inn't it? A. Yes, sir, certainly.

Q. In the talks which you had with Mr. Paul, they related to in cases when you started out in your conversation, did they not?

A. They did.

Q. That is one by the Greamery Package Manufacturing Company, and one by the Owatonna Manufacturing Company?

A Ves sir

Mr. Reigard. Plaintiffs and each of them now offer and read in evidence the deposition of G. N. Taylor. This is not in the form of a deposition, but is evidence which by agreement of parties may be used as evidence here, and is offered under a stipulation in relation

This testimony was given December 1907, in the case of D. E. Virne and the Owatonna Fanning Mill Company against the Creamery Package Manufacturing Company and others in the District Court of Steele County, Minnestota, and is to be used in this case with the same force and effect as if it had been taken in this case.

G. N. Taylor, called by plaintiffs and sworn, testified.

Mr. Leach

Qr. You live in the city of Owatonna? A. Yes sir.

Qa. What is your business? A. A drayman.

Q3. How long have you been engaged in that business?

A. Most of the time for the last ten years.

Q4. Do you get a share of your business around the Milwaukee and Northwestern freight depots in this city? A. Yes sir.

Qs. Did you see at those depots and observe churns shipped out of the city of Owatonna by the Owatonna Farming Mill Co. and Mr. Virtue! A. Yes sir.

Q6. Did you ever see Mr. Howe or Mr LaBare examining the tage on those muchines to see where they went?

Mr. Cohen: That is objected to as immaterial and irrelevant. Objection overmed. Defendants except.

A. I saw them once

O7. Can you tell when that was?

A. No sir, I couldn't exactly.

18. Was is before, or after the bringing of the suit of the Owa-Mig. Co. against Mr. Virtue? A. Just before, these law long before, if you can tall?

A. I couldn't tell as to that; it was not very long.

Qso. Did you have a conversation then with Mr. Howe or La Pare in regard to Mr. Virtue?

A. No sir, I had no conversation with him.

Q11. Did you hear either one of them say anything about Mr. Virtue? A. I did.

Q12. Who was it you heard say that? A. Mr. LaBare.

Q13. What did he say?

Mr. Cohen. That is objected to as immaterial and irrelevant, being the same class of declaration.

The Court. The objection will be sustained as to all the defendants, except the defendant LaBar.

A. I couldn't give it in exact words; I don't remember it.

Q14. Give the substance of it?

Mr. Cohen. We object to that.

The Court. The objection is sustained as to both the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company, but is overruled as to the defendant LaBare.

Mr. Sperry. I desire to make a special objection as to Mr. LaBare on the ground that it is immaterial, incompetent and irrelevant, that it does not connect Mr. LaBare with this case in any way. This was a mere conversation held between themselves, and not in the presence of any other party.

The Court. I will not change the ruling.

A. The substance was that I wouldn't have many more churns to haul for them, that they were about ready to close in on him and put them out of business; that is, as near as I can word it.

Q15. Can you remember any other expression, or the substance of any other expression that he made in that connection?

A. No sir.

Q16. About what they were going to do with Mr. Virtue? A. No sir.

Cross-examination read by Mr. Sperry.

Q17. You don't know really the day and time when these suits were brought, do you? A. No sir, I do not.

Q18. You judge it was before the time that the suits were brought because in the talk someone suggested they were going to bring the suits, is that it?

A. Yes sir, there had been talk about before that

Q19. But whether it was before or after you don't remember except by comparison with the talk at the time? A. That is all.

Qso. LaBare said you wouldn't have many more churns to ship for them, they were going to close in on them, do you remember the words "close its'

A. No, I said that was as near in substance as I could remember. Oar. Do you remember whether one of them used the words, Put them out of business"?

A I said I couldn't remember the exact words

Qaz. You are stating here in your own language what, in your memory, was the substance of what was said there? A. Yes air.

Ozz. And they were talking in a friendly way with you, were they? A. Yes sir.

024. Who was it that was doing the talking? A. Mr. LaBare.

O25. Who else was with him? A. Mr. T. J. Howe.

Oat. Which LaBare was it? Frank LaBare? A. Yes sir.

Redirect examination

Mr Leach.

Q27. Had you been hauling churns before that for the Owatonna Fanning Mill Company? A. Yes sir.

Q28. I suppose you heard of that suit when it was commenced, you heard of it as soon as it was commenced, did you? A. Yes sir.

Mr. Williamson: Plaintiff now offers in evidence the deposition of D. W. Payne.

D. W. Payne, sworn, testilied as follows:

Examined by Mr. Leach.

On. Mr. Payne, you live in Minneapolis? A. I do.

Qa. Are you the Mr. Payne who was associated with R. B. Disbrow and L. A. Disbrow in a corporation known as the Disbrow Mfg. Co.? A. Yes, sir.

O3. You are still a stockholder in the Disbrow Mfg. Company?

ACCYCL

Q4. Mr. Payne, I show you a letter dated January 6, 1898, directed from Owatonna, Minnesota, and signed by the Owatonna Mfg. Company. Will you look at that and see if that is a copy of a letter which you received at about that date?

A. I received such a

Qs. At about that date? A. Yes, I think it was.

Q6. You received it by mail? A. Yes, sir.

Ott. What I referred to was the postscript "We enclose Paul's

tter". A. I don't remember.

Ola. Where is the original letter that you received from the Owaonna Mig. Company, of which this is a copy, as near as you can tell?

A. I think it is with some of my papers.

O13. What was the position of Mr. T. J. Howe and what did he sate to you as to whether or not Mr. Distrow was the inventor of the Victor churn patent?

Mr. Cohen. We object to the form of this question on the ground

that it contains two separate questions.

Q14. What did Mr. Howe state to you about that?

A. I do not think that he ever stated whether he thought Disbrow. was the inventor or not.

Q15. You knew of the two suits which Mr. Paul has testified about which were brought against the Owatonna Fanning Mill Co. and Mr. Virtue? A. I knew something of them.

Q16. Were you a witness in those suits? A. I was.

Q24. Mr. Payne, do you know D. J. Ames, who has been mentioned in the testimony? A. I do.

Ozs. How long have you known him? A. Since 1893.

O26. Mr. Ames formerly lived at Owatonna? A. Yes bir.

Q27. Did you ever go with Mr. D. J. Ames to Claremont in Dodge County, Minnesota, and there with Mr. Ames examine a combined churn and butter worker which was then being operated at Claremont by Reuben Distrow? A. I did.

Qa8 Did you examine that machine with Mr. Ames?

A. I did and we did.

Qao. Was Mr. Disbrow here? A. Mr. R. B. Disbrow was there. Q30. Did you make more than one trip of that kind with Mr. Ames to Claremont? A. We did not.

Q3r. What was that date of the trip to Claremont and the date of your examination of that machine?

Mr. Cohen. We object to this question and line of examination as immaterial.

The Court sustains the objection.

Mr. Williamson. We offer to prove that the mechanism disclosed in and covered by the Howe, Ames and LaBare patent, under which the so-called two speed case was brought by the Owatonna Manufacburing Company against the defendants D. E. Virtue and the Owatonna Famning Mill Company was for a mechanism which had been disclosed to said Howe, Ames and LaBare, by Reuben B. Diebrow and Darius W. Payne, and was put onto a machine which was ultimately made by the Owatonna Manufacturing Company in accordance with the directions of said Resben B. Disbrow; and that said T. J. Howe and the officers of the Owatoma Manufacturing Company inner at the time they instituted this sait against said defendants that said patent was void, and was something which had been communicated by others.

Mr. Cohen. We object to this as immaterial and irrelevant.

The Court sustains the objection and counsel for plaintiff ex-

Mr. Williamson. I also offer to prove that they knew that said Howe, Ames and LaBare were not inventors, but that the same had been communicated by said Reuben B. Dishrow and Darius W. Payne, and that they purposely and intentionally appropriated the rights of the inventors, and procured a patent on the same, sucreptitiously and contrary to law; and that they knew that this patent was void when they instituted this suit.

Mr. Cohen. That is objected to as immaterial and irrelevant. The Court. Objection sustained.

Plaintiffs and each of them except to the ruling.

Mr. Leach. This is all of our evidence, excepting that we have some incidental statements by witnesses who are not here. It will be all computative, showing, as we think, that those two suits were brought in furtherance of a common scheme, and that they were brought together by the two companies. We cannot offer that evidence here at this time, because it is not here, but we can get it here on Monday.

The Court. I think there is sufficient evidence from which the jury might find that these two suits were brought by virtue of an agreement between the two companies; but I do not think it is evidence to show that there was mything more than an agreement to bring the two suits together; so that if he other evidence is merely cumulative I do not see how it would help matters to introduce it.

Mr. Leach. The Court holds that there is not evidence enough to go to the jury upon the question as to whether the two suits were hrought as a part of the scheme to secure a monopoly.

The Court. If these damages are damages which are within the contemplation of the act, it would be another question.

Mr. Lanch. There are some other small things which we have not proved that are stated in the complaint; that the two plaintiffs are the corner of all damages: I cannot prove that without getting at the damages, and Mr. Cohen may object on the ground that the plaintiffs are improperly joined.

The Court. Perhaps you can make an offer.

Mr. Leach. Then we offer to prove that the plaintiffs are the owners

all damages which are cought in this action, and that the plaintiffs the thir thou do not be excluded by their were the country of the personal property and the said property used in their butiness, which property is mentioned and described in the complaint, the same being the real property and personal property and the patterns and the right to use the patterns described in the complaint; also that the claimliffs had an intereste commerce and trade which was destroyed and takes away by the unlawful and wrongful acts of the defendants as stated in the complaint, and that the amounts of those damages are as stated in the complaint, and that they have not been paid. The Court. As to the matters first mentioned. I think upon them I would want to hear testimony. The others I should think might be shown by calling Mr. Virtue, and then making an offer afterwards.

#### D. E. VIRTUE,

recalled on his own behalf as one of the plaintiffs, testifies as follows:

# EXAMINED by Mr. Leach.

- Q. Mr. Virtue at the time these suits were brought, who was the owner of this manufacturing plant and the personal property consected with it, at the time the two suits were brought against you?
  - A. What munifacturing plant?
- Q. The manufacturing plant described in the complaint, do you aderstand my question?
- A. I think I do. It belonged to myself and the Owatoma Faming
- Q. Was that the property which you were using in the manufacture of these churns, Mr. Virtue?
  - A. It was.
- Q. Did you then have when these suits were brought an interstate trade and commerce in the manufacture and sale of chums?
  - A. We slid.
- Q. You were building them and making them at Owntonna in that manufacturing plant?
  - A. Yes, sir.
- Q. And shipping them from there to places in other states in the United States?
  - A. Yes, sir, we were.
- Q. And you proceed did that shipping, did you? A. You

Q. And selling? A. I made the deals.

O. Did you have agents and agencies in other states to whom or through whom you sold those machines?

Yes, sir.

At that time those suits were brought where did you have agents

A. I had an agency with J. G. Cherry & Co., at Cedar Rapids, lows, and with Mower & Harwood of Cedar Rapids in the state of

O. Where else?

A. Just in point of time, just confining it to the time before the suit was brought we were making deals at that time, but I don't know as I can just divide the time from memory, .....

Q. Can you give the names of any other agents or agencies that you had in other states, either before or after the suits were brought,

or about the time of the bringing of the suits?

A. I had an agency at Courtland, state of New York, the Chamtion Mille Cooler Company, and John W. Ladd & Co., Saginaw, Michigan.

Q. State of Michigan?

A. State of Michigan, and the National Creamery Supply Company, Chicago, Illinois: Charles H. Lilly & Co., Seattle, Washington;

J. H. Kennedy & Co., Kansas City, Missouri; Blackie & Hawk, St. Louis, Missouri. We had others, we sold to the Creamery Separator Company, Waterloo, Iowa, and shipped machines on their orders. That was one of the earlier ones.

Q. Did you and the Owatonna Fanning Mill Company during the years 1904 and 1905, or about that time, manufacture churus in your manufacturing plant at Owatonna for sale in those different places and ship them to those different states, and to the agencies that you have named in those different states, and sell them in those different states?

A. We did. I just happened to think of another concern at St. Paul, Minnesota, that we sold to, E. W. Ward & Co., and there were some of those people ordered them into other states, like St. Louis, Missour

The churns that were ordered from the concern in the state of Missouri, were ordered to be sent to what other states?

A. Blackie & Hawk had one shipped to Chattanooga, Tennessee, and one into the southern part of the state of Illinois.

Q. Did you do that shipping yourself? A. We did.

How were they shipped? A. Shipped by rail. By common carrier? A. Yes, sir.

Phose people that you have named were agents dealing in

rearriery supplies and churus, were they?

A. Particularly creamery supply houses.

O. Besides selling churns that way through those agencies, did ou sell some direct to the creameries?

A. We did.

O. And shipped those to other states aside from Minnesota?

A. We did not make sales at a great distance from our office our-

Q. My question was did you ship those to other states aside from Minnesota?

A. Yes, we shipped the larger part of the machines we made, we shipped them across the state line into other states.

Q. And some were sold to creameries direct?

A. I don't remember as we made sales ourselves, but we sold them to these supply houses, and shipped them where they were ordered to go.

Q. Where they were ordered to go by the supply houses?

A. Yes, sir, by the supply houses on their orders.

Q. To what extent did you go yourself and collect the pay for those churns? Did you do that to some extent?

Mr. Cohen. That is objected to as immaterial and incompetent.

The Court overrules the objection and counsel for defendants excepts to the ruling.

A. I did in some cases.

Q. Into what state did you go and collect the pay yourself?

A. Into the state of Iowa.

Q. And then afterwards paid the agent his commission? A. Yes.

Q. Were payments for those churns in some instances made to

A. Yes, sir, I got the money in some instances.

Q. And paid the agents out of the moneys that you got? A. Yes.

Q. What was the arrangement between you and your agents usu-

A. We made the agents a net price; that is, we made them a percentage discount from the list price, and we billed the machines to those houses subject to that discount from the list.

Q. Did you send any churns over into Canada?

A. I don't remember of that now. I don't think we ever did, although some of them did eventually get there, I understood.

Q. Did you ever see any of your churns and butter workers in other states?

A. Yes.

Q. What other state? A. In the state of Iowa.

Q. Whereabouts in Iowa? A. At Jewel Junction.

- Q. Was that sent direct to the come.

  A. Yes, sir, we shipped it to fewel fain
- A. I get the money for that machine.
- Is there any other place where you sold outside of the state? Good Rapids Creamery, near Newel, Iowa.
- Did you go there and get the pay for the churn? I went there and faulty settled the deal.
- Q. Was that a chara you had shipped three to that ereamery?
- A. We had shipped it direct to them. In that case I made a setnt, and the smooty was sent to J. G. Cherry & Co., of Cedar
- Capids, as I remember it.

  Q. Are there any other places where you saw your churus outside of the state? A. Wapello, Iowa.
  - Did you go there? A. I did.
- Was that a churn which you shipped direct to the creamery there? A. Yes, sir.
  - Q. Did you get your pay for the charn there?
  - The pay was sent to J. G. Cherry & Co.
  - They were the agents who ordered the machine sent there?
  - Yes, sir, they ordered the machine shipped there.
  - Can you mention say other places outside of this state? At Fort Dodge, Iowa
  - Did you go there?
  - I thid. I went there twice.
  - Was that a chure that was sent direct to the creamery there?

  - We had two chuses. Were they shipped direct?

  - A. Yes, sir, shipped them both direct.

    O. Did you collect the pay for the churns?
- A. No, the pay was collected by the Waterloo-Creamery Separator Company at that point. I believe it was sent to them,
- Q. During the years 1904 and 1905, about what part of your business was interstate business, that is, making your churm here ng them at other places, and shipping them to places in other etates?
- A. Most all of our business was outside of the state of Minneate at that time.
- Q. Did that continue to be so as long as you remained in busi-
  - A. Yes, the larger part of it was outside the state.
- O. How long did the Owatenna Fanning Mill Company and arried quantum to the housens of manufacturing combined churms donner makes of Owatena, and shipping them by sail to place

in the other states and selling them at places in other states, whose burn lock?

At I can't fix the exect date from memory, it is sometting over a year ago when we quite

Q: And at the time you quit or just before that time, what what of a business did you have?

Mr. Cohen. That is objected to as immaterial and incompetent. My objection is founded on the basis that no evidence of damages is admissible, without going particularly to the form of this question, on the ground that the damages laid in the complaint do not come within the Act.

The Court. I will hear you upon that subject. I think the question of damages might as well be settled at this time as at any other time, that is, unless you have some further evidence upon that point.

Mr. Leach. I think we have pretty nearly covered the ground,

The Court. Then I think we might as well settle that now.

Mr. Leach. We offer to prove now that the interstate business of the plaintiffs' was destroyed and taken away by the acts of the defendants, as set out in the complaint. We claim also that it was done not only by bringing these two suits, but also by these reports and rumors which were circulated round by the agents of the Creamery Package Manufacturing Company.

The Court. I think that had better be in a separate offer, if you make an offer to show damages by the institution of these two suits.

Mr. Leach. We offer to prove that the interstate commerce and trade of these two plaintiffs Mr. Virtue and the Owatoma Fauning Mill Company were taken away and destroyed and damaged by the prosecution of these two suits, one brought by the Owatoma Manufacturing Company, and one brought by the Creamery Package Manufacturing Company.

Mr. Cohen. I will object to the offer on the ground that it is immaterial and irrelevant and because they are not such damages as are provided for by the Sherman Act.

Mr. Leach. I will add that the plaintiffs have thereby sustained the damages claimed by them in the complaint.

Mr. Cohen. I will make the same objection:

The Court. I will hear you upon that proposition.

Mr. Leach. Sec. 7; of the Sherman Act, reads as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act; may one therefor in any circuit court of

the Patest States in the district in which the defendant raches is found without respect to the amount in controversy, and shall receive three fold the damages by Jam suntained, and the coats of subschilding a reasonable attorney if the Tappry must be combact too man's business or property. There cannot be any doubt that the plaintiffs had this business and property have been injured. We cented the good will and reputation are as much a part of a man's business a other property, and I think there cannot be any dispute about that it was recently decided—

The Coast. I will assume that it would come within the damage

Mr. Leach. When a man is injured in his property in this way of course the measure of damages would be what he has lost in the injury; that was decided in the Wisconsin case, as the value of the property which he has lost. We contend that the facts in the case clearly firing it and leave the damages within the purview of Sec. 7, of the Act, for two reasons, the first reason is we think we have originate here to show a general conspiracy dating back in 1892 and from then up to the pleasent title on the part of the Creamery Package Mannifacturing Company and also on the part of the Owntonia Manufacturing Company, also on the part of Mr. LaBare, he especially on the part of the Creamery Package Mannifacturing Company to sective a mesopoly in all of these states of the business or manufacturing combined charms shid butter workers. We claim that is shown beginning in 1897 in April, and is further shown when the Creamery Package Manufacturing Company disposed of a portion of the compenion of that company.

It is further shown in 1808, by the contract which that compare made at that time, by which another portion of the competition was eliminated. It is further shown we think by the contrantement of these two units against Mr. Virtue, to put him out of business. The commenced suit against him after they had sent a man here to my and buy him out. We think that is evidence which is stifficient to show or from which a jury could conclude that there was this forbidden position?

Of course compensor is not a contract, and we don't find compension written down in contracts. We so find comprisces quarter of any behind contracts, and we then that there are inventes, or the hydrights of them can be read into this complete. There is empleyed one of this will be well as just of this compensor, just as much as these various contracts which have been introduced in criticise. The fail is the theorems Package Magnifecturing Company, was considered in this finally as of pating this recoopely and driving people

a said sometimes tractice, at they thought the Age agency of mail 1905, except that they did get a of Mr. Burrell so a manifesioner and tasker of a ag of these things they have distance and nature trust, as we claim, and did drive other people i low, we contend that if these two is aght is a part of that so its was dikent and b law g he contend that even if there two law suits were not part of the comparacy, yet then the bringing of them in the which they were brought was illegal and wrong and prohibited the Act, because there were two suits brought together, not each company acting independently of its own accord, but the two suits a combination and conspiracy prohibited by the statute. In other ords, one may bring a law suit against another person to test a patent or to conduct litigation, but when two or more persons conire together for a common purpose to drive another person out of sincis, we can recover damages from them, because that is an act ich is prohibited by the statute, regardless of any other combination or conspiracy whatever

Another claim is that the evidence here shows that the Creamery Package Massificationing Company never had any right or title to any patent upon which they brought suit against Mr. Virtue, which further emphasizes and makes plain the unlawfulness of that suit; and we claim that because the contract under which they obtained title was an illegal and void contract and made in direct contravention of the statute. The Creamery Package Manufacturning Company could acquire so title to this patent upon which they brought action against Mr. Virtue.

Counsel cites the case of Dunhar against the American Telephone Company and other cases cited in his brief.

Mr. Reigard: As I understood it, the Court intimates that there

Mr. Reigard: As I understand it, the Court sixtuates that there has be no evidence here to show that there was a combination between the three parties defendant, or any two of them.

The Court That is, a combination or conspiracy between any of them to commence this action for the purpose of driving the plaintiffs out of business.

Mr. Reigard. Our contention is that the Creamery Package Maninstanting Company entered into an illegal combination which was manufacturated in part at the time the contract of Pebruary 21, 1808 was ignal; that whether or not the other parties had knowledge of that contract or that combinator we believe to be immersial if we to that any use of these parties have been connected with the continuous as restrained of trade, and then I think we can hold them if we a store proper damages. The evidence to far shows that lighter a substitutibly at the trace of the contamination of this contract the office of the Cremeny Package Manufa, turing Company through its pain committee appointed for that purpose, got together and formed the containation saying. We want to get together to control these into not for the purpose of actin them entirely saide." and it seems to me that this is cofficient to propose or settle that the Cremeny Package Manufacturing Company was in a containing such as would come within the scope of the Sherman Act.

The Court. I said that for the purpose of deciding this question the contract of February 24, 1898, and while was done in carrying on its terms, was an unlawful combination and a violation of Article of the Act. I shall assume that for the purposes of this part of the case.

Mr. Leseli. The object of the combination is to secure a monopole and the control of the combined and butter worker business throughout the states. It would be almost an impossibility to find a combination which would outline the acts which it proposed to perform in carrying that he places to secure this control or monopoly, in the contract, may be done by means of any one of a thousand different things which cannot be at this time connecrated; yet it seems to me that under the scope of this act its intention must be gathered from what was done at the time and after the combination was made. In this particular instance the plaintiffs have suffered damages by reason of his combination, not because of anything outlined in the contract or outlined in some of the records, because these acts are not matters which are placed of the records, because these acts are not matters which are placed or exert, as in the case where they came to Mr. Cushman, went down there and bought him out instead of lowering the prices, and thus force a plant first local to the contract. It weems to me it would be almost an impossibility to obtain redress in nine-tenths of the cases we make first local to the contract itself for all the things that they are going to do in order to accomplish the purposes of the unity ful combinations.

First these reasons I think this evidence simply showing one of the sets on the part of the Creamery Package Manufacturing Company to my authors of the other defendants, that were done in parsuance of the company tild accomplish the very object for which is was intented and for which the company that they object for which is was intented and for which the company that they would bring it washing the Analysis that they acts were carried into

effect

Mr. Leach: I would like to ask the Court if the evidence is sufficient, or if there is no evidence sufficient, to show that the suits were brought and prosecuted together:

The Court. No, I think there is sufficient evidence to larrant the jury in finding that there was an agreement to bring these case: together; but I think there is no evidence from which the jury would be justified in finding that the bringing of these two suits was done for the purpose of driving the plaintiffs out of business.

Mr. Leach. I might suggest that the testimony shows that defendants at the time they brought these actions were engaged in the very business of driving everybody else out of business who had come into the business, that they came to this plaintiff before commencing the lawsuits and tried to get him to go into the contract which would put him out of the business, into which he refused to enter; that the only means open to them was the lawsuit method if they wanted to get rid of Mr. Virtue. The general purposes of their acts show that they were engaged in that scheme of driving other people out, and of controlling the business themselves. We submit that where people engage in that kind of a conspiracy, or in that kind of an undertaking, and go to a man and try to buy him out, try to get rid of him in that way, in the way that they have got rid of many other people, they way they got rid of Mr. Custonan, and then come in with a lawsnit as they did with Mr. Virtue, that there can be no better proof of the object of the combination, of that lawstit than the very things which were done under it. We would hardly expect that the Creamery Package Manufacturing Company or the Owatonna Marufacturing Company of Mr. Labare would come forward and say "We did these things because we wanted to get a monopoly of the trade in these goods throughout the United States, and we did it to drive Mr. Virtue out of the business." The fact that they did drive Mr. Virtue out of the business, the fact that they did get a monopoly of the trade by these means, would seem to be pretty plain evidence as to what they sought and attempted to get, taken in connection with the fact that they were engaged in that very business.

The court in one of the cases cited said it is uncless for defendants to say they did not intend to make the very combination which they did make, and so it seems to me it is useless for them to see that they didn't intend to drive Mr. Virtue out of business, and it is useless for them to say they didn't intend to get a monopoly of the trade, because the very things they did do did drive Mr. Virtue out of business, and did give them a very large monopoly of the trade. If that is not so then in no case anywhere can it ever be

proved against any one that he commenced a law suit to drive a man out of business. Then again The Creamery Package Manufacturing Company had no cause of action upon which it had a right to bring suit against these plaintiffs. It did not rely upon its own action, but they brought two suits together, knowing that by bringing the two suits together it would have a great deal more effect upon Mr. Virtue than if it only brought only one. I suppose in the ordinary course of affairs, in every day life, if you were to give this case to any ordinary person to say "What did the Creamery Package Manufacturing Company intend to do?" He would at once say that it did that so as to put Mr. Virtue out of business, so that it could get a monopoly." We think that having brought these suits, having secured a monopoly by the bringing of these suits, there is sufficient evidence to go to the jury upon the question as to whether or not they did bring these suits for that purpose.

Now this case has taken a long time to try, and we have very nearly concluded it on our side, and it does seem to me that it would be more proper to submit this case to the jury, and then it can be reviewed afterwards upon a motion for a new trial; I submit it would be better to do this rather than to stop in the middle or near the end of this lawsuit. We think there is ample evidence and it is the very kind of evidence which must be pro fuced, and the only kind of evidence that can be produced in order to show these things. If this evidence is not sufficient, then people can go on and do these things, and they will have the approval of the court if there is not sufficient evidence to show that they actually did it. Another thing we have a long line of authorities which hold that if the direct result of the acts of the defendants is to destroy interstate commerce and trade, then the intention of the defendants is immaterial.

The Court. They hold that where the acts done result in damage to and restraint of interstate commerce and trade then in that kind of a case the intention is immaterial. The reason I assumed that the contract in February 24, 1898, was in restraint of trade, regardless of the intention of the parties who made it, is because I assume that the necessary effect of that contract was to restrain trade.

Mr. Leach. Isn't that equally true with regard to these two lawsuits? These persons when they commenced these law-nits knew very well that they were going to damage and restrain the interstate trade and commerce of these places, and that that would be the necessary effect of the bringing of these suits, and also that the necessary effect of the bringing of these two law suits would be to put the plaintiff of business. It has had that result, and when they made this

contract they came within that a ss of cases in which the effect or result of their acts was very apparent, that it would result in putting these plaintiffs out of business. We claim that they are estopped from saying that they did not intend to do anything of that kind. They commenced these two suits together, and they prosecuted them together, one being a cause of action wherein they did not have a recent, and the other being a cause of action where they didn't have any cause of action at all. In fact, we have a case where Mr. Virtue was rightfully and lawfully engaged in interstate commerce and trade with this property; the defendants get together, and by the only means in their power, and by the most direct means in their power drive him out of business by law suits, one wherein the Creamery Package Manufacturing Company had no cause of action against Mr. Virtue, because it had no patent. and one wherein the Owatonna Manufacturing Company had no cause of action against Mr. Virtue because he was not infringing any patent that that company owned. And so, directly and necessarily the consequence of the acts of these defendants in bringing those lawsuits and in making Mr. Virtue attend to them, was to drive him out of business. We can show by testimony that this was the direct and necessary effect upon Mr. Virtue by the bringing of these lawsuits. We can show that he was at once compelled to leave his business, the manufacturing and selling of churns, and was required to give his attention to the defense of these lawsuits, and the evidence already in shows that the necessary result of these rumors which were circulated by these defendants was to call off and destroy his trade.

(Here the Court asked Mr. Leach the following question: "If the Creamery Package Manuf turing Company had brought an action against a creamery in Iowa and it had been defeated in the action, on account of there being no infringement, would you contend that such creamery could turn around and sue the Creamery Package Manufacturing Company and recover three times what the creamery company in Iowa had expended in the defense of that law suit?"

To which question Mr. Leach responded: "No, because the creamery in Iowa had no interstate trade and commerce which was injured and damaged."

And the Court then stated that in its opinion it was immaterial whether the creamery company in Iowa, or the plaintiffs in this case at bar, had any interstate trade or commerce, and mentioned the case of Chattanooga F. & P. Works v. City of Atlanta, (203 U. S. 320, 52 L. ed. 241, 27 Sup. Crt. Rep. 65) as holding that it was not necessary for a plaintiff to have interstate trade and commerce in order

to emistable action under the Sherman Anti-Trust Act and recover

Also Mr. Leach here called the attention of the Court to U. S. Supreme Court case of Loewe v. Lawler, (208 U. S. 274, 52 L. ed. 488, 28 Sup. Crt. Rap. 300.) and counsel read to the Court a portion of this case, and counsel here argond to the court that the case at hir is like and is controlled by the said Loewe v. Lawler case, for the reason that in the Loewe v. Lawler case the plaintiffs were driven out of business and had their interstate trade damaged on account of the combining of the defendants and the doing by the detendants of those things which naturally would and in fact did diminish and injure the business of the plaintiffs, and in the case at has the defendants did combine together when they brought their two law suits together and they did those things which naturally would and which in fact did destroy and take away the interstate business and trade of these plaintiffs.)

Mr. Williamson. Is this consideration not worth noting as to the general interpretation of this act? Would it not have the effect of practically emasculating that act, and leaving this great wrong unreached? The defendants here have reached out and got hold of these different concerns for the admitted purpose of controlling and raising prices, and thus do the very wrong which the Sherman Act was intended to stop. We have proved that fact, we have proved the illegal combination, and we think it is important in some way to stop that sort of thing, and to prevent any one else from doing these same acts. If it is held that they can go on and correl all these different articles, put them together and thereby drive everybody else out of trade, and that these people have no remedy and no right of recovery of damages, do we not leave it open for them to do the very thing which the Sherman Act was intended to stop?

The Court. I think I shall have to sustain the objection to this evidence. In the discussions we have had during the trial I have indicated somewhat my views as to this question.

This is an action for damages, and can be maintained only upon proof of such damages as are contemplated by the Act. The fact that it cannot be maintained would not allow the defendant the Creamery Packale Manufacturing Company to continue this unlawful combination, because the Act itself provides for a suit by the United States. The connect of Petroary 24th, 1946, was a contract to which the Owstonia Manufacturing Company vanues a party. To my mind there is no evidence in the case on this that company responsible for anything which that then the careying out of these contents, and if it is liable for

ing Company it must be by reason of the making of some other contract between these two companies, either written or anal.

Taking up the case against the Creamery Package Manufacturing Company, as I stated several times during the argument, I assume for the purposes of this decision, that this contract of February 24, 1898, was a contract in restraint of trade, and to create a monopoly. But I cannot believe that everything that was done by that company after the 24th of February, 1898, which produced damages, gave rise to a cause of action under the Act, and subjected it to treble damages. The company under the contract acquired title to a large amount of real and personal property. It commenced an action to enforce its suppose I rights to that property, but the damages which resulted by reason of the enforcement of such rights, either its personal or real property rights, are not, to my mind, damages which are contemplated by this Act.

By reason of that unlawful combination it might be that it would be defected in the action; as for example, it if commenced a suit against a creamery for infringement of one or more of the patents acquired by the company, as suggested by counsel, perhaps it might fall in that action; but that would not give the person against whom it brought suit a right to recover treble damages, three times the expense that the creamery had been put to in the defense of that action. Or if the company commenced an action to enforce its rights to some of the real estate thus acquired, it might fall in that cause, because the title might be defective; but the adverse party in that case could not in my opinion, recover three times the damages it had suffered by reason of that litigation.

What did the Creamery Package Manufacturing Company do in this particular case? It commenced an action against D. E. Virtue for an infringement of its patent. That patent that was acquired by virtue of the contract of Pebruary 24, 1898. Up to the present time the Creamery Company has succeeded in that action, and its I understand it, if it fails bereafter it fails not because Virtue and the Owntonea Ranning Mill Company did not infringe the patent, but because the wrong person brought the action; in other words, the action about have been brought by the assignor of the Creamery Package Manufacturing Company, instead of by the Creamery Package Manufacturing Company itself. It seems to me that having brought the action which it did, and having project the infringement of that patent, the particular did, and having project the infringement of that patent, the particular in defeated cannot maintain an action against this company in recover all the core and expenses which it had incurred in the uncoversall defeated of the action, or these times that amount according to 8 a propolation. The reason why shows these throughs were suffered by

Mr. Virtue was not this unlawful combination, but the act of infringement by himself. If he had not infringed the patent he would not have suffered any damages. To my mind the damages contemplated by this Act are the damages which result naturally from the making of the unlawful contract, as in the case of the Pittsburgh Glass Company, where there was a special agreement in the contract itself to raise the price of glass to all persons who were not inside the combination. So in the case in San Francisco, where there was an agreement to self certain fixtures at an enhanced price to persons outside of a combination. The natural effect of this would be to damage persons outside of the combination, and to my mind those are damages which can be recovered.

As far as the Owatonna Manufacturing Company is concerned, as I have stated, they were not parties to the contract of February 24. 1808, and not responsible for anything done by the Creamery Package Manufacturing Company, one of the defendants here in carrying out the terms of that contract. The contract made in April 1897, between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, was not a contract in restraint of trade, nor was it an attempt to create a monopoly. It was merely a contract making the Creamery Package Manufacturing Company the sales agent of the Owatonna Manufacturing Company, and I do not think it violates the Act. Nor do I see anything in the subsequent contract made between the Disbrows and the Owatonna Manufacturing Company, or between the Disbrows and the Creamery Package Manufacturing Company which violates the terms of the Act. It is very evident. not only from the contracts themselves, but from the oral and other evidence presented, that the Disbrow contract was made solely and for no other purpose than to settle the litigation which existed between the Disbrows and the Owatonna Manufacturing Company. At any rate, there is no evidence which would justify a jury in finding that the Owatonna Manufacturing Company entered into any combination or contract with any one that was in violation of either Section One or Section Two of the Act. So that the Creamery Package Manufacturing Company cannot be held responsible for the failure of the Owatonna Manufacturing Company to maintain its action, and it canot be held responsible although it may have entered into an unlawful aspiracy with other persons for it has not entered into any such onspiracy with the Owatonna Manufacturing Company.

Then outside of the contract of February 24, 1808, and outside of the contract of April 1807, and outside of all the other written contracts between the parties, it is claimed by plaintiffs that there was another contract between the Creamery Package Manufacturing Comsay and the Owatopus Manufacturing Company, by virtue of which

they agreed to bring these suits in order to drive the plaintiffs out of business. If there were evidence to go to the jury that these companies were guilty of making any such contract as that I should feel inclined to submit the case to the jury. But there is no evidence in my opinion, which would warrant the jury in finding that any agreement of that kind existed. The only result that the jury would be justified in reaching would be that there was an agreement to bring these two suits together, but that is not sufficient. If the original contract of February 24, 1808, had provided for the bringing of an action against alleged infringers for the purpose of driving them out of business, that would be a different thing altogether, but there is nothing in that contract which shows the contemplation of anything of that kind. The stockholders could not have believed that such unlawful means would be resorted to for the purpose of carrying the contract. into effect. The stockholders had a right to believe that the officers of the company would confine themselves to the contract itself.

It is suggested that if the two companies made an agreement to burn the establishment of the plaintiff for the purpose of driving them out of business, that would be a contract in violation of this Act. That might be so, but such an agreement as that, or such an act as that, would not naturally result from the making of the agreement of February 24, 1898. In order to make the companies liable or either of the companies liable or the Creamery Package Manufacturing Company liable, for such an act as the destruction by fire of the establishment of the plaintiffs, it would be necessary to prove some other contract than that of February 24,1808, for that contract would not in any way justify such an act on the part of the Creamery Package Manufacturing Company.

For these reasons I shall have to sustain the objection, and to hold, as a matter of law, that the damages alleged in the complaint, as I understand the complaint are not such damages as are contemplated by the Act, and there can be no recovery for them in this action. As to the defendant LaBare, I do not see any evidence at all against him, and I shall be compelled to order a verdict in his favor.

Mr. Williamson. This was simply an interlocutory order.

The Court. Yes, I so understand it.

Mr. Leach. If Mr. Sperry would make a motion to dismiss as to

Mr. LaBare, we would not object to it.

The Court. I do not know that Mr. LaBare wishes to have his case dismissed. I denied the motion at one time during the trial of this case.

Mr. Leach. I will make a motion that the case be dropped and dismissed, as far as Frank LaBare is concerned.

The Court. I will deny the motion.

Mr. Leach. We desire to proceed with the case as against the defendants the Owntenna Manufacturing Company and the Creamery Package Manufacturing Company

Mr. Oshen. We object to the dismissal of the case as to Frank La Bare at this stage of the trial.

The Court. I will deny the motion to dismiss as to Frank LaBare Counsel for plaintiff excepts to the ruling of the court denying the dismissal of the case as against the defendant Frank LaBare.

Mr. Leach. We desire to except to the ruling of the Court in sustaining the objection of the defendants to the evidence offered by the o latinostica

The Court. Very well.

Mr. Leach. We now offer to prove that the plaintiff the Owatonna anning Mill Company never at any time by anything that it did infringed any patent mentioned or sued upon either in the case brought by the Owetoma Manufacturing Company against Mr. Virtue and the Owatonna Fanning Mill Company, or any patent sued upon or menhiored in the bill of complaint brought by the Creamery Package Mannfacturing Company against Mr. Virtue and the Owatoma Fanning Mill Company.

Mr. Cohen. We object to any evidence to that effect, on the ground thet it is emouste vial and irreferant.

The Court sustains the objection, and counsel for plaintiffs excepts to the ruling.

Mr. Leach. We separately offer to prove that the plaintiff and the Owatonna Fanning Mill Company never at any time infringed any patent mentioned in the bill of complaint in the case of the Creamery e Manufacturing Company against the Owatonna Fanning Mill Company and D. E. Virtue, which bill of complaint is Exhibit E-1, attached to the complaint, in this case.

Mr. Cohen. That is objected to as immaterial and irrelevant.

The Court sustains the objection and counsel for plaintiffs excepts the ruling.

Mr. Leach. We also offer to prove that Mr. D. E. Virtue never any time intringed any patent or any letters patent mentioned or scribed or set forth in the bill of complaint of the Creamery Pack-Manufacturing Company, which is attached to the hill of complaint this case, and is marked Exhibit E-1.

fr. Cohen. That is objected to as immaterial and irrelevant.

Le Court proteins the objection, and example for plaintiffs excepts

Touch. With regard to those numbers and the other things

which the Court mentioned, we think we have shown enough of these to entitle us to damages, it being in restraint of trade. We have connected those rumors with the defendants in such a way as they would be liable to us in this case for damages.

The Court. The rumors, as I understand it, were sent out either by agents for the company or by the companies themselves, to the effect that persons who used that churn would be prosecuted. I do not think that would be sufficient.

Counsel for plaintiffs excepts to the ruling.

Mr. Leach. We have no further evidence, your Honor.

Mr. Cohen. The defendants now move that a verdict be directed in favor of the defendants and each of them.

The Court. I will grant the motion.

Counsel for plaintiffs excepts to the ruling.

The Court then charges the jury as follows:

Gentlemen of the jury, in view of the law which the Court takes of this case, no cause of action has been made out by the plaintiffs that would entitle them to recover anything in this case, and I therefore direct you to return a verdict in favor of the defendants.

Counsel for plaintiffs excepts to the ruling of the Court in directing a verdict in favor of the defendants.

A verdict in favor of the defendants is then rendered by the jury.

A stay of execution is granted by the Court for a period of ninety flays.

# PLAINTIFFS' EXHIBIT P-3.

LIST OF DIRECTORS OF THE CREAMERY PKG. MFG. CO.

1898

C. M. Gates

D. E. Wood W. W. Sherwin

H. J. Ferris

H. H. Curtis

F. B. Fargo

A. H. Barber

1800

C. M. Gates

D. E. Wood

1904

C. M. Gates

D. E. Wood

H. J. Ferria

C. H. Higgs George Walker

H. H. Curtis

C. S. Hook

C. H. Higgs

D E Wood

W. W. Sherwin H. J. Ferris H. H. Curtis F. B. Fargo

A, H. Barber

1000

C. M. Gates
D. E. Wood
W. W. Sherwin
H. J. Perris
H. H. Curtis
P. B. Fargo
A. H. Barber

1901

C. M. Gates
D. E. Wood
W. W. Sherwin
F. B. Pargo
H. H. Curtis
H. J. Ferris
A. H. Barber

1002

C. M. Gates A. H. Barber W. W. Sherwin H. J. Ferris H. H. Curtis D. E. Wood C. H. Higgs

1903

C. M. Gates D. E. Wood H. J. Ferris H. H. Curtis A. H. Barber C. H. Higgs George Walker C. M. Gates H. J. Ferris C. S. Hook H. H. Curtis George Walker

1906

C. M. Gates
D. E. Wood
H. J. Ferris
C. H. Higgs
H. H. Curtis
Ralph Stoddard
C. S. Hook

1907

C. M. Gates
D. E. Wood
C. S. Hook
H. H. Curtis
H. J. Ferris
C. H. Higgs
Ralph Stoddard

Phos

C. H. Higgs
C. M. Gates
C. S. Hook
H. H. Curtis
D. E. Wood
George Walker
H. J. Ferris

1909

C. H. Higgs
C. M. Cates
D. E. Wood
H. J. Ferris
C. S. Hook
H. H. Curtis
George Walker
D. H. Roe
G. F. Bellmap

#### PLAINTIFFS' EXHIBIT P-5.

# UNITED STATES CIRCUIT COURT, DISTRICT OF MINNE-

#### SOTA, FIRST DIVISION.

D. E. Virtue and the Owatonna Fanning Mill Company, Plaintiffs.

VS

The Creamery Package Manufacturing Company,
The Owatonna Manufacturing Company,
Thomas J. Howe, Frank LaBare and Charles H. Higgs, Defendants.

# PLEASE TAKE NOTICE:

The above named plaintiffs request you to produce and have on the trial of the above entitled action at Winona, Minnesota, which trial is now set to begin on July 27, 1909, the following papers and records, to-wit:

- 1. That certain assignment of letters patent No. 539,571, and that certain assignment of letters patent No. 565,720, and that certain assignment of letters patent No. 600,168, all of which assignments were signed by F. B. Fargo & Company and ran to the Creamery Package Manufacturing Company, and each and all of which hear the date of May 16, 1898.
- 2. That certain assignment of letters patent No. 565,791, and that certain assignment of letters patent No. 581,133, which two last mentioned assignments were executed by F. B. Fargo & Company, and in which the Creamery Package Manufacturing Company is named as assignee, and which two assignments bear some date in the year 1898 subsequent to February 24, 1898.
- 3. That certain contract, and all contracts and bills of sale, executed or made sometime in the year 1906 between the Creamery Package Manufacturing Company and the concern known as the E. W. Ward Company, of St. Paul, Minnesota, under and by virtue of which contracts and bills of sale the said Creamery Package Manufacturing Company took possession of all of the property of said E. W. Ward Company located in St. Paul sometime during the year 1906.
- 4. Any and all contracts which have been made by and between the Creamery Package Manufacturing Company and D. H. Burrell

Company.

5. That certain letter dated October 14, 1001, addressed and written to Cornish, Curtis & Greene Co. Pt. Atkinson, Wis, and signed "C. K. Bennett, Cashier", which letter is as follows, to-wit:

Owatonna, Minn., 14 Oct. 1901,

Cornish, Curtiss & Green Co., Fort Atkinson, Wis.

Gentlemen:

Mr. Martin Deeg of this city has ordered a churn from you. Kindly note that you may ship this churn to this bank and that we will remit for the same on arrival the sum of \$75 and pay the freight ourselves. The churn is to be well crated by you and delivered at the station in Ft. Atkinson.

Very truly yours, C. K. Bennett, Cashier.

Dated this 10th day of July, 1909.

LEACH & REIGARD,

Attorneys for Plaintiffs, Owatonna, Minnesota.

To Creamery Package Manufacturing Company and to Messrs. Cohen, Atwater & Shaw, its attorneys. On the back of which paper appears the following:

"Service at within notice to produce is served upon us by copy delivered this 17th day of July 1909.

> COHEN, ATWATER & SHAW, Anys for Cremery Pkg. Mig. Co.

## PLAINTIFFS EXHIBIT P.6.

PAUL & PAUL, Assorneys at Law.

Patent & Trade Mark Causes.

Minneapolis, Minn., Oct. 17, 1994.

Course F. Hilliamson, N. S. Course Fair, 1986a, Chy

Contract of the Contract of th

James Chicago Wolarsky agent to complet with my Chicago

## PLAINTIFFS: EXHIBIT P-7.

# THE NORTH AMERICAN TELEGRAPH COMPANY

Received at 12:40 Guaranty Loan Bldg., Minneapolis 10-20, 1904.

To Jas. F. Williamson. Will proceed with both suits.

A. C. PAUL

# DEFENDANTS' EXHIBIT D-3.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF
MINNESOTA, FOURTH DIVISION.

Creamery Package Manufacturing Company, Complainant,

**VS**.

IN EQUITY

Owatonna Faming Mill Company, and D. E. Virtue, Defendants.

Owatonna Manufacturing Company, Complainant,

¥3.

IN EQUITY.

Owatonna Fanning Mill Company, and D. E. Virtue, Defendants.

#### STIPULATION.

The parties to the above entitled causes, by their respective counsel, bereby stipulate and agree as follows:

I. That the testimony on behalf of the respective parties to the above entitled causes may be taken anywhere within the United States before any qualified Notary Public, or other office competent to administer an oath, at the place where testimony is taken; that said testimony so taken shall stand and have the same force and effect as if taken before a standing officer of the Court or Special Estimater duly appointed in said causes; that such testimony shall be taken orally under the forth Rule in Equity, by question and answer, and to reduced to typewriting by the officer taking the same, or by a skilled tenographer or typewriter under his direction, the said testimony may be taken upon reasonable notice of the time, the place, the name

of the officer before whom the same is to be taken and the names of the witnesses to be examined, first served upon counsel for the other party.

II. That all testimony taken in either of the two above entitled causes may be read and used in the other cause, so far as competent and pertinent thereto, with the same force and effect as if taken directly therein.

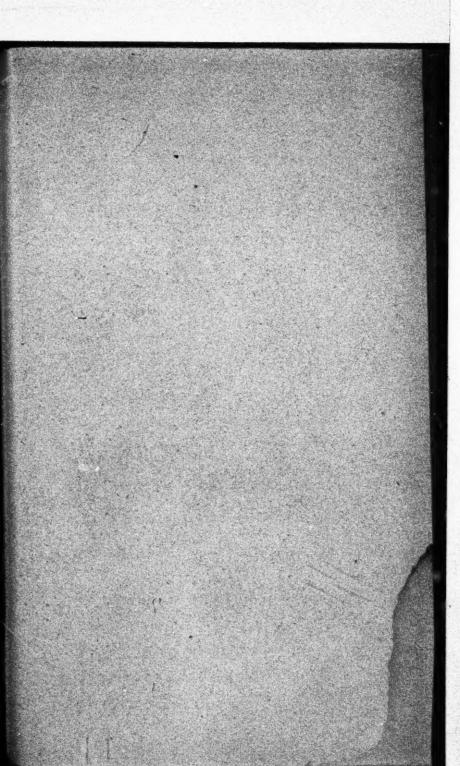
III. That uncertified official printed copies of U. S. and Foreign Letters Patent may be offered and used in evidence on hehalf of either party in each of said suits, with the same force and effect as if the original patents themselves, or certified copies thereof, were produced and offered, subject, however, to corrections by comparison with the originals or certified copies if error may be found in such uncertified printed official copies.

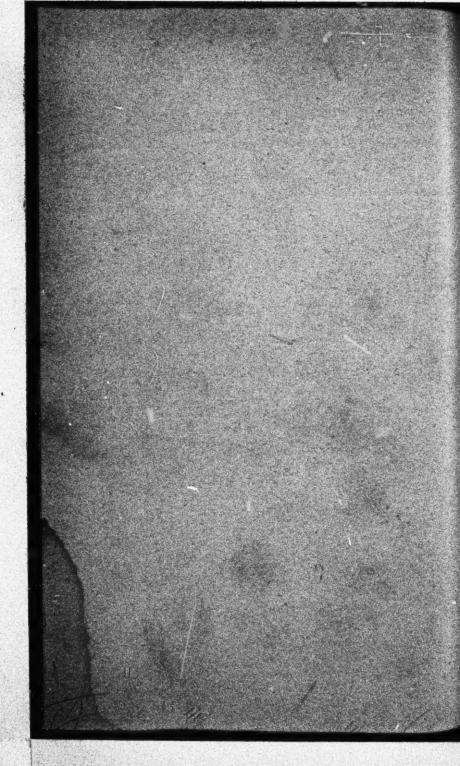
4. That all exhibits offered in evidence on behalf of the respective parties may be retained by the counsel for the party producing the same, subject to inspection by counsel for the other party at any time, on demand, in the presence of the party retaining the same, and to be produced at all examinations, and at the final hearing.

Signed at Minneapolis, Minn., this 12th day of December, 1904.

A. C. PAUL,
Counsel for Complainants.
WILLIAMSON & MERCHANT,
Counsel for Defendants.

Endorsed.
Filed December 17th, 1904.
Henry D. Lang, Clerk,
By Margaret C. Noonan, Deputy.





) D. S. Virga and the five cars Number Philippin

The Creamers Package Manufacturing Country, Ton-govas Banufacturing Company, Thomas & E Frank La Barra, and Charles H. Higgs Described

Please take Notice:

That the case needs attached and herevith perceion is the plantin's proposed case in the above entitle ion, and that such case together with each amendment in the proposed by you will be presented to Host. Characteristic in the Characteristic Characteristic in the Education of the Characteristic Cha

OAVAL AUGUST SIL 1818)

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sect. Cohen. Advaber & Ch. v. Attorney ( to Color Streamour Package Manniscouring Company and o A Spect. Bog. and A. C. Paul Bog. A torneys to Belendation the Gystmans the inheractor was and Prent Le Bare.

United States Obereit Courts District of Mines ober First Division

1). B. Viscus and the Ownorm Canning of the Course

Package Manufacturing Company, Ca Manifacturing Company, Thomas U. 14 Here and Charles B. Higgs Benedic

the control of the special control of the scale of the sc

GLADINE GOETH

and eworn to before me this 2nd day of Septem-

TARLAN B. LEADH,

Noticey Public in and for Steele County, Min-

To compulsion expires Jan. 2, 1912.

United State Circuit Court District of Minnesota, First Division.

II P. Virine and the Owntonna Panning Mill Company, Plaintiffs,

The Company, The Company, The Company, The Company, Thomas J. Howe, Thank I.A. Bare and Charles H. Higgs, Defendants.

on migral Streic -63.

T. Leach, being duly sworn, rays:

City of Minnespolls, County of Homepin, State

on the dist day of Angust No., affiant served

and proposed case input Messes. C but, Africa

ty then and there handles to and kniving with

the tests of said proposed case, the said John
that is a member of the firm of Couch, Atwater
the and there were the attorneys of resided and

the area in said defendant the Greamery Fackage

the the Coupling.

HARLAN B. LEACH.

1 and Aporto to infore me this indiday of September

A. W. SAWYER.

Notary Public in and for Steele County, Minuseum Province 27th, 1912.

United States Operate Course District of Minnesota.

u. D. Pirine and The Ornicks of Coding Mill Con-

The Oromory Probage Spanisolaring Company of a Company Change Manufacturing Company Thomas J. House Frenk La mare and Charatt H. Higgs, Decoding a

I Charles A. Willard, the Judge who tried I talked ited action, do hereby certify that I have axtracted the ing statement and the exhibits thereby attacked the ing pages "210" to "574", both inclusive, of the form or inted matter, beginning with the tile to sale action page "210"), and have found the same conformable in truth; that the sale statement, with said schilling, emission the evidence given or offered and all the proceedings in the evidence given or offered and all the proceedings in the trial of said action; that on motion of plainting along entitled action, and on due notice to defendents, the statement, with said exhibits, is hereby settled, allowed and igned as the case in the above suitition of the come a part of the records of this Court in said setton.

The objection to "Q. 81" on page "457" of the record systamed and the answer not read; but the answer is but the record at the request of plaintiffs to show what it we have been if the objection had been everywed, it beins a put a deposition.

Dated September 22d, 1909.

CHARLES A. WILLARD July

779a On the Sist day of July 1908, the following Verdict on fudgment thereon was entered of record in table of in the words and figures following, to wit —

172 United States Circuit Court, District of Monesota, First Division.

Term Minutes, May Term A. D., 1909.

July Slat 18.

Pacurday morning, nine o'clock.

Court opened pursuant to adjournment.

Present: Hon, Charles A. Willard Judge.

Henry D. Lang, Clerk.

By Mahel L. Sheardown, Leyel,

The second section of the property of the second section of the section

ming ment many processing the Court to the land without the cost and a time a very fall process feet a new without a literature being fully advised to the present example and a more a and a more a many accordance with the process of the court of the co

..... White Charalt Carty District of Ministrata. First District

is a sent the Owerloan Faulding Mill Company,

Verher.

: In the above carrilled cause, by direction of the

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W. Bull WM, Worman.

the control (the principal for the form) and the form of the form of the form of the form of the form of

- In the second of the seco

It is startly but and a greed by and between the position become be local respective attaches in open conserving account likely so order of, that such of the parties herein in this count relation of seven and received in evidence in the trial of seven

Ordered that this court he row adjourn until opened to the further tracks that of backness that may arise provides to the rest previous to the spening of the next resteral term to the self Division of the District.

A troe recuci

A sheets 1

STENDEN D. LANG. Cle-

6611/4 Thereafter soil on the 22nd day of Reptember 1898 (a following Motion 10th a new trial was filed of received a maid canno, to wife:—

Ell United States Chemit Court. District of Miny and First Division.

D. P. Virtue and the Gwatenna Funning Mili Company Plaintiffs,

The Creamery Fackage Manufacturing Company; The Ownton na Menufacturing Company Thomas J. Howe, France :-Bare and Caarles H. Higgs, Defendants

Pierra Chie Notica

Tant at the commbers of Hom Charles A. William, U. S. Jackson and R. In the Network hulldive, in the Stry of Minnesotts in Henneyla County, Starty of Minnesotts, on the Land day assembly 1900 at ten o'clock in the forenoon, the above make plaintiffs will move said court and the Hon. Charles A. Will as ladge thereof, for an order entire aside the viculty fore retreated by the jury and for a new trial of said the second start of the second s

28 (1) The Court errod in discuss (on more 800 of the record) the jury to return a distant in inverse that

I such. We offer to prove that the interstate commerced of these was plaintiffe Mr. Virtue and the Owatonia Mill Company was: taken tway and destroyed and by the prosecution of these two mits, one brough Owatonia Manufacturing Company and one brough Company Package Manufacturing Company.

The Court, and for (reducting (in the coord prings of the bottom of page 86% of the team), the objection of the admired to the other of providing to plaintiff at the page 96% of the coord, which is offer a factor of the coord, which offer a factor of the coord, which collect a factor of the coord, which collect a factor of the coord, which collect a factor of the coord, which collects are consistent of the coord of th

The Court error in sestaining the objection of the depletion of the deplet

There of the second combined charms and betwee work you say are still in operation, what hind of arough he seen doing?"

The Court errol is quetabling the objection of the ante to the first question appearing at the top of page a record (relating to the nature and extent of the busing pisingiffs which was destroyed by defendants), which is an follows:

And at the time you quit or just before that thee, the

The Court errol is the following of the

n pure 507 of the report in the following conversation, on the Court and counsel for plaintiffs (at the middle page 557), to with

I such. We offer to preve now that the interstate busing the plainting was destroyed and taken away by the acts to defend and as set out in the complaint. We claim also it was done not only by bringing these two sulfs, but also see reports and rumors which were circulated round by puts of the Casamery Pactage Handfacturing Company.

The Court. I think that had better he in a separate offer I you make an offer to show damages by the institution of these two pulse.

Then at the bottom of price 568 of the record, counsel for plaintiffs offered to prove that on account of said feet ports and remore which were constanted around by the agents of the Creamery Package Manufacturing Company (as mandoned in the last above quotation from the eccord), the plaintiffs sustained the damages to their said interstate business mentioned in the last above quotation, which offer of proof of the plaintiffs appears in the last line at the bottom of manifacturing appears in the last line at the bottom of manifacture 560 and in the first four lines at the top of page 560 of the record, in these rights, to wit:

Mr. Leads. White regard to those rumous and the uniterthings which the court mentioned, we think we have shown enough of these to intitle us to damages, it being in resemble at herds. We have connected those rumous with the defendants in such a way as they would be liable to us in this case for damages."

The Court software, at the top of said page 500, to permit the plainting to make said proof. In this tile Court error.

(7) The Court erred in sustaining the objection of the defendance to the last question on page 242 of the record because which question is as follows, (solating to the contract has hible "F" attached to the complaint):

\*O. Ton knew of a cerealn contract made between the Ornine Curcle & Greene Mig. 6s. and the Createry Problem Manufacturing Company, D. R. Vircus and March Boy of Owntones, sometime in 1966, or about that time?"

(B) The Court error in mutaining the objection of the contents to the questions on page 244 and on page 245 and on the first half of page 246 of the record become (call questions relating to call content Braible 40° attached to the coupling to the acts and conduct of the defendance in terms to the acts and conduct of the defendance in terms to the Admitter's).

The Court errol he matching the objection of he indicate to the third question on page 248 of the record to show that the said contract Exhibit "O" was never care out by the Greamery Package Manufacturing Company), while question is as follows, to wit:

Ontiet

the contract of the site of th

The White did you say to Mr. Howe Mitted the two saids, and what old he my to you?

the track and arred is an abinist; the objection of the desires to the offer of proof made by the plaintiffs, as appeared as made of page 525 of the record herein (relating to a remark of as a flored or committator).

the objection of the middle of page 324 of the collection of the decrease to the question of the middle of page 324 of the colling for a statement of an alleged co-comparator), to provide to an follows:

(C) When men that talk, Mr. Roman P.

(B) The Ocean expect his morbifuling the objection of the demarks to the question two thirds of the way down them the rest page (W or the result (calling for a sectionism of the allian comparison), which question is at follows:

Too may state what that conversation was?"

14). The Court error is containing the objection of the demants to the last question on page 493 of the second (calling or a strengent of an alleged en-complicated), which question as follows:

Will you tell on what it was that Mr. Howe told you that recorded ?

(48) The Court breed has belighing the dyperion of the demarks to fire question two-lifths of the way deem from the marks to fire question two-lifthing for a likeworth of earling to a likeworth of earling for a likeworth of earling the committees, which question like to Others

Thre the inversage of that convenience

(10) The Overt errol in containing the objection of the two condant corporations to "Q18" sear the top of page 540 of a record (and question calling for a statement by the design of Frank La Bare); which question is as follows:

"Ulb. What did he my?"

The Court excel is unstabling the objection of the average and an experience of the last above two fifths of the last on from the top of page 540 of the record (said question)

North all the 181 th contribution thick took po Amorel's and Trans the Rose at the toward

is) one of the expense is an expension of the expense of the late of the expension of the e

## "Q. You may make what this conversation was?"

20): The Court eried the materiality the objection of endants to the question in the third fire from the top a 434 of the record, which question is as follows, to wi

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1) The Court erred in striking one at the top of page a second, the pertunday of the witness sa to state a at the middle of page 480 of the record i made by that IA Bare to said witness, which evidence so structolious:

Et. 12 Stre come like my office and requested me inche frest fatt that my bropher was coming as a indictable be read on the cost like was going to come to gue to such a three or such a train, and he wanted as bushe and meet also, the see if I could not kind of indi-cable and vetter may there and no come are theree may wouldn't be it. That I wouldn't have muching a and didn't want to go anyway. He finally inspect ing duty to help in this suit, as I was drawing to the District Meterracturing Company on the and that I ought to go there and get by to, to where Mr. Paul the lawyer for the Channer acturing Company could meet him and talk Mr. Virtue say him ( That was his words to m

the other of proof of the plaintime, appearing of the other of proof of the plaintime, appearing down from the top of page 568 of the above from the top of page 568 of the plaintime never infringed and tioned in the bill of complaint in said out brought poly on the product of the first of the product of in teach. We separately offer to prove that the putintiful the Owntowns Faming Mill Company never at any time inged only patent mentioned in the Mill of complaint in pass of the Creamery Package Manufacturing Company and the Owntown Faming Mill Company and I. E. Victus till at complaint is Exhibit P.1. attacked to the com-(24) The Court carry in recurring the objective of a part of the plaintiffs appearing to a part of the plaintiffs appearing to a part of page Victor in soon; (an affect to allow that the shift IV IV victor never intranged to a patent nemotion in and suits brought by the Creatney are victor to a part of the plaintiffs are victorially appeared to a part of the plaintiffs are victorially appeared. The Local We also offer to prove that Mr. B. M. Viener at any time intringed any patent or any letters put attacked of described or set forth in the bill of complaint Company. Package Manufacturing Company, which is the to the bill of complaint in this case, and is marked. The Court errod in maspinding the objection of de to the offer of proof made by Mr. Williamson at the famous the of the record, and in the first four lines a fact that of the record, which effect of proof is on fo

"Mo. Williamson. We offer to prove that the mechanism dislosed in and dovered by the Hove, American La Bare patent e veri de la companion de la c

it & Circuit Court Disc. of Minn. for Division 15, 35, 31, 31, 31, Greenway Prop. Mag. Co. et al. Copyr. Morton Sec. 1

And on the same day to wit: Suptember 22nd, 1901 following Order of Court despite plaintills motion to a new trial was entered of record in gald cetter, to all trained for the Christic Court, District at Historica.

First Division.

and the Courterns Painting Mill Groups

Occamicy Parkage Manufacturing Company, forms Panning Mill Company, Thomas J. H. La. Bare and Charles H. Higgs, Defendants.

Order Desying Motion for New Trial.

(SHARDER & WILLARD, Judge Land: Fried September 220 d 1900; Reney D. Lang, 1960; Br. Cho, F. Hibbereck, Fr. Depuig. Later the core day newly September 220 d 1900; the plinting Analysis of Brook and prayer for systemal of Old of record for all the ballet, to will the

the Vision and the Company Papering Mill Company,

The second consists of the production of the part of the feet of the feet of the part of the feet of t

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ion, Lead. Twill-edd that the plaintim have thereby in

(4) The Court erred in mustaining the disjection of the defendance to "QDI" on page 45% of the report (caked to their that the charge sold by plaintim did good work), which quantity is an follows:

"GB). Those Gwatonna combined thurns and butter well or which you say are still in operation, what kind of west lays they teen doing?"

(5) The Court errod in manistring the objection of the defendants to the first question appearing at the top of page Gor of the record (relating to the nature and extent of the business of the plaintiffs which was destroyed by defendants), which question is as follows:

(4) And at the time you quit or just before that time, who bind or a business did you have?"

(8) The Court erred in the following respect:

On page \$57 of the record is the following conversation in tween the Court and comment for plaintiffs (at the middle of mid page \$57) to wit:

Mr. Least. We offer to prove any flar the interestic backs of the plaintiffs was destroyed and taken away by the coof the defendants, as see out in the complaint. We dain also that the was done not only by bringing these two saits but the by these reports and rumors which were chealable wound by these reports and rumors which were chealable wound by the agents of the Greathery Package Manufacturing Communications.

The Court! I think that had better be in a separate of a son make an offer to show damages by the institution of the free rule."

too, Then at the bottom of page 468 of the record, connection plantiffs offered to prove that on account of mistreports and remove which were throughted read by the section of the Ureamery Package Manufacturing Computer (as mentioned in the last above quotation from the record) in plaintiffs sustained the damages to their said interestate by

remarkable in the list show making, which offer all proportions appears in the less line at the installing and page of the plantific appears in the less line at the installing at the top of page of the record in these words to those runners and the other tops which the court mentioned, we think we have shown that the these to entitle us to damage, it being in correlations to these to entitle us to damage, it being in correlations. We have connected those runners with the datend on tach a viaz as they would be hable to us in this case damage.

The fourt reduced, at the top of said page 160, to permit the minting to make said proof. In this the Court erred.

The Court erred in sustaining the objection of the demonstrate to the last question on page 242 of the record herein, the question is an follows, (relating to the contract Exemps 157 attached to the complaint):

The kinet of a certain contract made between the lastal Ourtie A Greene Mig. On and the Creamery Packer Manual Ourtie A Greene Mig. On and the Creamery Packer Manual Courties a Greene Mig. On and the Creamery Packer Manual Courties a Greene Mig. On and the Creamery Packer Manual Courties a Greene Mig. On and the Creamery Packer Manual Courties a Greene Mig. On and the Creamery Packer Manual Courties and Morties Described to the Manual Courties at Manual Courties and Morties Described to the Manual Courties at Manual Courties and Morties Described to the Manual Courties at Manual Courties at Manual Courties at Morties and

The Court error in 1900, or about that time?"

The Court error in sustaining the objection of the defeates to the equations on page 244 and on page 245 and a large half of rage 246 of the record hards (said quantum courting to 4rd contract Bunblit "C" attached to the restricting to 4rd contract Bunblit "C" attached to the restricting to 4rd contract.

(B) The Court errod in annualing the objection of the detentials to the third question on page 248 of the record (airlod to store that the sold conteact Einfilit "O" was never extract on the Oreans y Patings Hamile turing Company); which increase is sold our to-wit:

Do you remember the contract never was carried one

(16) The Court erred in sustaining the objection of the delendants to the first question at the top of page 524 of the second (said question relating to an oral statement of an alleged or conspirates), which question is as follows:

"O What did you say to Mr. Howe althou these two mits, and what did he say to you?"

(12) The Crust Street in nestalbing the objection of the decommits of the offer of proof made by the plainting, as appoint of the middle of page 225 of the recent herein (white O:E statement of an alleged co-computation)

- (12) The Court deven is sustaining the objection of infordants to the question at the middle of many tot of the school brilling for a tentement of an allogan to compliants with which question is as follows:
  - "Q. What was the tell, Mr. Bolton ?"
- (12) The Court erred in questaining the dijection of the fendance to the question two-thirds of the way howe from the top of page 462 of the record (calling for a statement of an alleged op-conspirator), which question is an follows:
  - "Q. You may state what that convenientles was?"
- (14) The Court errol in sustaining the objection of the defendants to the last question on page 400 of the record (calling for a scatterest of an alleged to conspirator), which question is as follows:
- \*Q. Will you tell us what it was that Mr. Howe bold re-
- (15) The Court wreed in seasaining the objection of the defendance to the question two-lifths of the way down from the on of page 554 of the second (calling for a authorism of an alleged to conspirator), which question is an follows:
  - 190 Blvs the most to of that sometimes
- (16) The Court of L. I. on training the objection of the two defendant corporations to "CES" near the top of page 555 of the record (sein numerous calling for a statement by the detendant Frank La Bure), which spection to as follows:
  - "Old What did be say?
- (17) The Court erred in sustaining the Objection of the University Corporations to Qtd' about two-fields of the Court from the top of page 849 of the receipt (note on Concalling for a statement of the elements Frank in Recoil which question is as follows, frewit:
  - "Q14. Give the substance of 117"
- the defendant the Creamery Package Manufacturing the objection of the defendant the Creamery Package Manufacturing Company to the second question from the top of page the decoral (waiting for a statement of the defendant Frank to Bare), which question is at follows, to wit:
- Mov. will you tell the convenation which took place between remedit and Frank La Sam at that time?

The Court ened in apptaining the objection of the de that in the question two thirds of the way down from the top of page 433 of the record, which question is as foltowit:

You may state what that conversation was?"

The Court erred in sustaining the objection of the detains to the question in the third line from the top of page that the record, which question is as follows, to wit:

"Q. You may state what that conversation was?"

- The Court erred in striking out, at the top of page 436 the record, the testimony of the witness as to statements with at the middle of page 435 of the record) made by the resident In Bare to said witness, which evidence so struck is as follows:
- We has he first said that my brother was coming as a wittened that he was on the read and was going to start from Years on such a date on such a train, and he wanted me to Comsha and meet him, and see if I could not kind of innin that he had better stay there and not come any furI told him I wouldn't do it, that I wouldn't have saything
  to with it. I didn't want to go anyway. He finally insisted
  to was my duty to help in this suit, as I was drawing
  these through the Disbrow Manufacturing Company on
  Disbrow churn, and that I ought to go there and get him
  top off at Ma hato where Mr. Paul the lawyer for the
  meet Package Manufacturing Company could meet him
  to talk with him before Mr. Virtue saw him. That was his
- (13) The Court erred in anataining the objection of the demotants to the offer of proof of the plaintiffs, appearing two trans of the way down from the top of page 565 of the record, an offer to show that the plaintiffs never infringed any patent restioned in the bill of complaint in anid suit brought by Owntonna Manufacturing Company against the plaintiffs and which offer of proof is as follows:
  - If Leach: We now offer to prove that the plaintiff the storing Panning Hill Company never at any time by anything that it did infringed any patent mentioned or aged upon either in the case brought by the Ovatonna Manufacturing Company against Mr. Virtue and the come Panning Hill Company, or any patent sued upon mentioned in the bill of complaint brought by the Overmery

Package Manufacturing Company against Mr. Vistor and the Gustonne Fanning Mill Company?

(28) The Court erred in austaining the objection of fendants to the offer of proof appearing three fift is of the down from the top of page 508 of the record, (an offer that the plaintiffs never infringed any patent mentioned to bill of complaint in said suit brought by the defendant Gray Package Manufacturing Company against the plaintin herein) which offer of proof is as follows:

"Mr Leach: We separately offer to prove that the pialitic and the Owatonna Fanning Mill Company never at any time infringed any patent mentioned in the bill of complaint in the case of the Creamery Package Manufacturing Company against the Owatonna Fanning Mill Company and D. E. Titta, which bill of complaint is Exhibit E-I, attached to the complaint, in this case."

(24) The Court erred in sustaining the objection of defendants to the offer of proof of the plaintiffs, appearing the bottom of page 568 of the record, (an offer to show the plaintiff D. E. Virtue never infringed any patent tioned in the bill of complaint in said suit brought by Greamery Package Manufacturing Company against the plaintiffs herein), which offer of proof is as follows:

"Mr. Leach: We also offer to prove that Mr. D. E. Virus never at any time infringed any patent or any letters put mentioned or described or set forth in the bill of complaint of the Creamery Package Manufacturing Company, which is a tached to the bill of complaint in this case, and is marked by hibit E-1."

(2") The Court erred in anstaining the objection of fendants to the offer of proof made by Mr. Williamson at the bottom of page 551 of the record and in the first four line at the top of page 552 of the record, which offer of proof as follows:

"Mr. Williamson: We offer to prove that the mechanic disclosed in and covered by the Howe, Ames and La Bare pent, under which the so-called two speed case was brought the Owntonna Manufacturing Company against the outlants D. E. Virtue and the Owntonna Fanning Mill Company as for a mechanism which had been disclosed to sale from Ames and La Bare, by Reuben B. Disbrow and Darrus M. Payne, and was put into a machine which was ultimately man

remions Manufacturing Company in accordance with procious of said Reuber B. Disbrow; and that said T. J. and the officers of the Owatonna Manufacturing Company are at the time they instituted this suit against said patent was void, and was samething which had been communicated by others."

(26) The Court erred in sustaining the objection of the defendants to the offer of proof made by Mr. Wilson beginning in the eighth line on page 552 of the record, the offer of proof is as follows:

Here. Williamson: I also offer to prove that they knew that they and La Bare were not inventors, but that the and been communicated by said Reuben B. Dishrow and the W. Payne, and that they purposely and intentionally contacted the rights of the inventors, and procured a patthe same, surreptificually and contrary to law; and that are that this putent was void when they instituted this

(ny) The Court erred in refusing to grant a new trial here-

Wherefore, Plaintiffs ask that the judgment heretofore enin said Circuit Court in the above entitled setion be read and set aside, and that the order heretofore made and acred in said action denying a new trial therein, he vacated set aside, and that these plaintiffs have a new trial of said

D. E. VIRTUE and The OWATONNA FANNING MILL COMPANY,

Plaintiffs.

By Leach & Reigard, Their Attorneys, Owatonna, Minnesots.

Clerk. By Geo. F. Hitchcock, Jr., Deputy.

And on the same day September 22nd 1909, the following Felition for Writ of Error and allowance of same was filed of record in said cause, to-wit:—

Circuit Court of the United States District of Minne-

The Creamery Package Manufacturing Company, The Oak tonna Manufacturing Company, Thomas J. Hows, Frank Labore and Charles H. Higgs, Defendants. elition for Writ of River

The above named plaintiffs, D. E. Virtue and the Ownton's Penning 1 II Company conceiving themselves aggreefed by the independent rendered and entered in the above entitled at an on fully 31st, 1989, and by the order of said Court there for and on September 22nd 1909 made denying a new trial in acid action, hereby respectfully asks that a writ of error because out of said court, directed to the clerk thereof, cammanding the said clerk to send the record and proceeding with all longs concerning the same to the United States On cult Court of Appeals, for the Elgans Chronic, and thus a right on be granted directed to the above named defendants. Occurry Pacings Manufacturing Company the Ownton's Hamfacturing Company and Frank La Bare, commanding them to appear before and Court of Appeals to do and received to be done in the premises.

### DEACH & REIGARD. Appropries for Plainting

508 This 22nd day of September 1909 it is ordered that a writ of error issue as prayed for and that plats in erecute and file a bond in the sum of five hundred (4500) dol-lars, to be approved by the undersigned, in the usual form a such cases made and provided

#### CHARLES A WILLARD Some

Chert. By Geo. F. Hitchcock, Jr., Deputy.

1981/ And on the name day the following bond was filed in record in taid cause, fo-wit:

That we, D. E. Virtue, Emmet Virtue and W. I. Virtue, Emmet Virtue and W. I. Virtue, are held and firmly bound unto the are held and firmly bound unto the Creamery Puckage Manufacturing Company, the Ownton Manufacturing Company and Frank Le. Bare, in the full and last sum of five hundred (\$500) dollars, to be paid to the Creamery Pickage Manufacturing Company, Owntokas Manufacturing Company and Frank Le. Bare, their being obsention in this statement of an accessors of an analysis, to which payment well

and truly to be made, we bind ourselves, our heirs, executors administrators, jointly and severally by these presents.

to the year of our Lord one thousand nine hundred and nine.

thereas, lately at the May 1869 term of the Circuit Court in the State of Minneson, in a suit pending in said court and the Circuit Court of the Circuit Panning Mill Complaintiffs, and the Creamery Fackage Maintacturing out the Owatoma Manufacturing Company and Frank have, defendants, judgment was rendered against the said maintaint and a motion for a new trial dealed the plaintiffs have obtained a well of arrow of the said to reverse the indgment and order in the aforesaid suit, estation directed to the said defendants, citing and administ them to be and appear in the United State & Circuit of Appeals for the Joighth Circuit, at the City of State, Missouri, an November 15th, 1906.

Now the condition of the above obligation is such, that if said D. E. Virtue and the Owatonia Familie, Mill Comstall prosecute wild writ of error to effect, and answer all control to their ples, then and costs if they fail to make good their ples, then apprea obligation to be void, else to remain in full force and

D. E. VERTUE. BAMBE VIRTUE. W. VIRTUE

oned and Bellvered in Precence of Chan L. Reignird, United E. Leach.

Approved by Charles A. Willard, Judge

State of Minnesota, Steale County—as.

before me, on this 22nd day of September 1909, personally exceed the above and foregoing mentioned D. B. Virtue, Em-J. Virtue and W. J. Virtue, to me known to be the persons executed the foregoing bond, and each acknowledged that recuted the same as his free act and deed.

HARDAN R DEACH, Notary Public, Steele County, Mins.

y com relation expires Jan 2, 1012.

State of Minnesote;

Emmet J. Virtue and W. J. Virtue, being each duly swon says, each for himself, that he is a resident and freeholder of the State of Minnesota, and is worth and has property to extent of more than the sum of one thousand dollars, exercise of his debts and property exempt from execution.

EMMENT VIETUR, W. & VIETUR

Subscribed and sworz to before me this 22nd day of September 1909

STATES OF STATES

Notacy Public, Steele County, Minnesota My commission expires Jan. 2, 1912.

(Notarial Real)

Endorsed: Filed September 22nd 1960, Henry D. Lang. Clark. By Geo. F. Hitchcock, Jr., Deputy.

8001/2 Whereupon and on the same day the following Writ of Error was issued out of and under the seal of said Court in words and figures following, to-wit:—

001. United States of America - an

The President of the United States of America, To the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota, Phys. Division.—Greeting:

Because, in the records and proceedings, as also in the rention of the judgment of a plea which is in the said Orrest Court, before you, at the May Term, 1909, thereof, between I E Virtue and the Owatonna Fanning Mill Community Plaintiffs, and The Creamery Package Manufacturing Company. The Owatonna Manufacturing Company and Frank Bare, Defendants, manifest error hath Lappened, to the great damage of the said Plaintiffs, as by their complaint appears

We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the partie aforesaid in this behalf, do command you, if judgment therein given, that then, under your seak distinctly and operly, you send the record and proceedings aforesaid, with an things concerning the same, to the United States Circuit Course that you have the said record and proceedings aforesaid the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the

Circuit, on or before the 21st day of November, 1900, end that the record and proceedings aforesaid, being ted, the United States Circuit Court of Appeals may further to be done therein to correct that error, what it, and according to the laws and ensteins of the United thould be tone.

of Supreme Court of the United States, this 22nd day of Supreme A. D. 1969.

. Circuit Court. of Minnesota th Division.

Imued at office in Minneapolis, Minaccepts, with the scal of the Circuit Court of the United States for the District of Minnesots. Pourth Division

EDENISY D. LANC.

Oleck of the Obrenit Source of the Duited States of America for the District of Minnesota.

By Geo. F. Hitchcock, Jr., Deputy.

Howed by Charles A. Willard, Judge.

Hed September 22, 1908, Henry D. Fang, bleck, By IGeo. Hitcheock, Jr., Deputy.

led St. es of America, District of Minnesots, First Division—se.

in obedience to the command of the writ. I herewith trans-to the United States Circuit Court of Appeals, a duly sited transcript of the record and proceedings in the within and course, with all things concerning the name.

E Chronit Court ist, of Minnesota

In Witness Whereof, I hereto subscribe my name and affix the seal of the Circuit Court of the United States for the District of Minnerots, Pirst Division.

DENRY D. LANG.

Clerk of the Circult Court of the United States of America for the District of Minnesota,

By Mahel L. Sheardown, Deputy,

Thereafter and on the same day to vit. September 22nd, 1900, the following Obstion and proof of service was fled of record in said cause, 6-vit:

#### Citation

United States of America, No The Orestnery Package Mono feetneing Company, Owatonna Manufacturing Company, and Frank La Bare—Greating:

You are hereby cited and administed to be and appear in the United States Circuit Court of Appeals for the Dighth Circuit the City of St. Lonis, Misseard, sixty days from and after the city of St. Lonis, Misseard, sixty days from and after the day this citation bears date, pursuant to a writ of error flowin the Clerk's Office of the United States Circuit Court when D. E. Virtue and the Gwatchan Fanning MH Company as Plaintiffs and you see Defendants to show these, if any the be, why the judgment rendered against the old Plaintiffs in said writ of service mondoned should not be corrected, why seemly justice should not be done the parties in that had

Witness, the Honorable Charles A. Willard, Judge of Lin United States District Court this 22nd day of September A. D. 1909;

CRARLES A WILLIAMS Judge of the United States District Source

Due Service of the foregoing Citation by Copy at Minneapour Minneapte is hereby admitted this 22nd day of September 1900.

COHEN. ATWATER & SHAW, Attorneys for the Creamery Package Mig. Co.

#### A. O. PAUL, Attorneys for Owatonna Mrg. Co. and Franks La

Attorneys for Ovatonia Rig. 50 and Franks.

Entered No. 125, United States Circuit Court, District of Minnesota, First Division, D. E. Virtue, et al. Creamerr Package Mig. Oo. et al. Detendant, Citation, Physics 22nd day of September 1909, Henry D. Lang, Clerk, D. Geo. F. Hitchcock, Deputy.

60214 Thereafter and on the 25th day of September 190 the following Praccipe for Return to the United States On I cult Court of Appeals was filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Piro-Division.

tery Package Maninfacturing Company, a Manufacturin, Company, Thomas J. Ho Bare and Charles E. Higgs, Defend

the Clerk of the above named Courts

making return to the Chronit Court of Appeals in the entitled cause, you will please include the following file matitude your returns, vis.

The compaint in 6518 section.
The separate answer of the defendant Creataery Pacinetary Company.

arate answer of the defendant Ovatonna Mann

Company, and the said Oreansery Package Manuscompany to its separate answer, which amendment

d canuary 25, 1900.
The neparate grawer of the detendant Frank La Bare.
Reply of Plainting to the separate answer (as aniended
to 1, 1200 of Creamery Package Manuacturing Com-

Reply of plaintiffs to the separate answer of the Owa-

Manufacturing Company:
The reply of plaintiffs to the enswer of Frank La Bare.
Order of court dated July 13, 1909, allowing an amendto the separate answer of the Creamery Package Manu-

Amendment of Greamery Package Manufacturing Com-(duted July 14, 1909), to its sunwer, pursuant to said

order of July 12, 1909.

11. Order of court dates July 13, 1909, allowing an amendment to the separate answer of Owatonne Magucuring Company

Amendment of Owntown Hamiltetring Company of July 14, 1909) to the answer, pursuant to said order of

verdict e.d. judgment.
The motion for a new trial of said action ...
The owner of said court dated Repvis is motion for a new trial.

e assignments of error flied in mild a

ADACOH LINERGA EL

Filed Represides 25th, 1909. Clays By Makel J. Sheardayn, Leputy.

United States of America, Circuit Court of the United States, District of Minnesots, First Division.

i, Henry D. Lang, Clerk of the said Circuit Court, is het city and return to the United States Gircuit Court of Lighter 1. Long Clerk of the axis Civerit Court of a peals for the Eights Circuit that the foregoing consisting of pages numbered consecutively from 1 or 604 inclusive, true and complete transcript of so much of the records a coding pleatings orders hast judgment and other processings in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the case as follows, to-wit. Complaint in axis in the permit of the defendant Creamery Factage in facturing Company. The Amendment of axis answer, which amendment is dated January 28. If the Separate answer of Frank IA Bare: Reply of Plainting the Separate answer of the Owntones Manufacturing to pany Beply of Plainting to the Answer of Frank Ia Deter of Court dated July 15, 1909 allowing an uncentral Omegany: Amendment to the separate Answer of the Creamery Pactage Manufacturing Company: Amendment of the Reputage Manufacturing Company: Amendment to the Reputage Manufacturing Company: Amendment to the Reputage Manufacturing Company (dated July 18, 1909) Order of Court dated July 18, 1909; Order of Court dated July allowing an uncention of Manufacturing Company (dated July 18, 1909). The Settles Company of Section (dated July 14, 1909) to its attentions and the axis order of July 18th-1908; The Settles Courting the of Judge that record constains all the evidence; Verdice and Judgment; Motion for New Trial II alanying Motion for a New Trial II alanying Motion for New Trial II al leaving Metion for a New Trul; Antonnent of Error;

or Whatest I have becomes set by hand and affixed the seal of said court, at Winons, in the Dis-clet of Minnesota, this 25th day of September A. B. 1808.

HENRY D. LANG, Clerk. By Muhel It. Sheardown, Deputy. 1908, John Et. Jordan, Clerk:

(Appearance of Counsel for Plaintiffs in Error.)

On the eighth day of October, A. D. 1909, the appearance of samel for plaintiffs in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3167.

D. E. VIRTUE et al., Plaintiffs in Error,
VE.
THE CREAMERY PACKAGE MANUFACTURING COMPANY et al.

The Clerk will enter our appearance as Counsel for the Plaintiffs in Error.

HARLAN E. LEACH,
Owatonna, Minn.
CHARLES I. REIGARD,
Owatonna, Minn.
JAMES F. WILLIAMSON,
925 Guaranty Loan Bldg., Minneapolis, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 1167. D. E. Virtue, et al., Plaintiffs in Error, vs. The Creamery Package Manufacturing Company, et al. Appearance. Filed Oct. 1909. John D. Jordan, Clerk. Harlan E. Loach, Charles I. Legard, James F. Williamson, Counsel for Plaintiffs in Error.

Appearance of Mesers. Cohen, Atwater & Shaw as Counsel for the Defendant in Error The Creamery Package Manufacturing Co.)

And on the twentieth day of November, A. D. 1909, the appearance of Messrs. Cohen, Atwater & Shaw, as counsel for the defendant in error The Creamery Package Manufacturing Company was lad in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3167.

D. E. VIRTUE et al., Plaintiffs in Error,
vs.
The Creamery Package Manufacturing Company et al.

The Clerk will enter my appearance as Counsel for the Defendant Error, The Creamery Package Manufacturing Company.

EMANUEL COHEN.
JOHN B. ATWATER.
FRANK W. SHAW.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. Na 8167. D. E. Virtue, et al., Plaintiffs in Error, vs. The Creamery Package Mfg. Co., et al. Appearance. Filed Nov. 20, 1909, John D. Jordan, Clerk. Emanuel Cohen, John B. Atwater, Frank W. Shaw, Counsel for Defendant in Error, The Creamery Package Mnfg. Co.

(Appearance of Mr. W. A. Sperry, as Counsel for Defendants in Error Frank La Bare and Owstonna Munufacturing Company.)

And on the twenty-aixth day of November, A. D. 1909, the appearance of Mr. W. A. Sperry, as counsel for the defendants in error Frank La Bare and Owatonna Manufacturing Company, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3167.

D. E. Vierus et al., Plaintiffs in Error,

THE CREAMERY PACKAGE MANUFACTURING COMPANY et al.

The Clerk will enter my appearance as Counsel for the defendant in error, Frank Le Bare and Owatonna Manufacturing Company.

W. A. SPERRY, Owatonna, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. Na 3167. D. E. Virtue, et al., Plaintiffs in Error, va. The Creamery Package Mfg. Co., et al. Appearance. Filed Nov. 26, 1909, John D. Jordan, Clerk. W. A. Sperry, Counsel for defendants in error.

### (Stipulation to Correct Errors in Transcript.)

And on the sixth day of December, A. D. 1909, a stipulation to correct errors in the transcript was filed in said cause, in the words and figures following, to-wit:

# United States Circuit Court of Appeals, Eighth Circuit.

No. 3167

D. E. Vierus et al., Plaintiffs in Error,

THE CREAMERY PACKAGE MANUFACTURING COMPANY of al., Defendants in Error.

Stipulation to Correct Return.

Certain errors having been made in the return made in this cause to this Court,

Now, in order to correct said errors, it is hereby stipulated that the return herein be corrected in the following particulars: On Page "312," line "25," by striking out "and driving them

out:" On Page "314" by striking out lines "36," "37," "38," and "39." On Page "325," line "21," by striking out "and the counsel for

plaintiffs duly excepted to the ruling;"

On Page "340," after the sixth line, by inserting, "Mr. Leach: You may use the letters from that paper book;" and

On Page "393," line "15," by inserting "from" between "words"

md "to;" and

It is further stipulated that such order as the Court shall deem proper may be made hereon without notice to either party. Dated December 2d, 1909.

> LEACH & REIGARD. Attorneys for Plaintiffs in Error. COHEN, ATWATER & SHAW, Attorneys for Defendant in Error The Creamery Package Manufacturing Co. A. C. PAUL, Attorney for Other Defendants in Error.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. \$167. Dennis E. Virtue, et al., Plaintiffs in Error, vs. The Creamery Package Manufacturing Company, et al., Defendants in Error. Stipulation to Correct Return. Filed Dec. 6, 1909. John D. Jordan, Clerk. Cohen, Atwater & Shaw, Attorneys for Defendant in Error, \$13 Nicollet Ave., Minnespolis, Minn.

Appearance of Mr. A. C. Paul for Defendants in Error Owatonna Manufacturing Company and Frank La Bare.)

And on the ninth day of December, A. D. 1909, the appearance of Mr. A. C. Paul, as counsel for the defendants in error Owatonna fanufacturing Company and Frank La Bare, was filed in said cause, in the words and figures following, to-wit:

#### (Opinion.)

And on the twenty-third day of March, A. D. 1910, an opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

#### No. 3167.

DENNIS E. VIRTUE and OWATONNA FANNING MILL COMPANY, Plaintiffs in Error,

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWatonna Manufacturing Company and Frank La Bare, Defendants in Error.

In Error to the Circuit Court of the United States for the District of

Mr. Harlan E. Leach (Mr. Charles I. Reigard and Mr. James P. Williamson were with him on the brief), for plaintiffs in error.

Mr. Emanuel Cohen (Mr. John B. Atwater and Mr. Frank W. Shaw were with him on the brief), for the defendant in error, The Creamery Package Manufacturing Company.

Mr. A. C. Paul (Mr. W. A. Sperry was with him on the brief), for the defendants in error, The Owatonna Manufacturing Company and Frank Le Bare.

Before Sanborn and Adams, Circuit Judges, and Riner, District Judge.

Rram, District Judge, delivered the opinion of the court.

The plaintiffs in error were plaintiffs in the Circuit Court, the defendants in error were defendants in the Circuit Court, and will be be be reafter referred to as plaintiffs and defendants, respectively.

This was an action at law to recover treble damages under the seventh section of the Act of Congress of July 2, 1890, 26 Statutes, 209.

The court below directed the jury to return a verdict in favor of the defendants for the reason that the damages alleged in the complaint were not such damages as were contemplated by the Act of Congress just mentioned.

The plaintiffs were engaged in the business of manufacturing combined churns and butter workers at Owatonna, Minnesota, and from there shipping and selling them in Minnesota and in other States.

The defendant, the Creamery Package Manufacturing Company, a corporation organized under the laws of Illinois, was also engaged

in manufacturing and selling throughout the United States all kinds of dairy and creamery supplies and installing in creameries complete

treamery outfits.

The defendant, the Owatonna Manufacturing Company, a corporstion organised under the laws of Minnesota, was engaged in the manufacture of combined churns and butter workers. The defendant La Bare, was president of the last named corporation. The product of its plant was sold throughout the different States of the United States by the defendant, the Creamery Package Manufactur-

ing Company, pursuant to a contract hereafter referred to.

The record discloses that on the 2d of October, 1893, by an instrument in writing, Reuben B. Disbrow and Darius W. Payne, then owners of letters patent numbered 490,105, for a consideration, swigned said patent and the exclusive right to manufacture and sell throughout the United States and territories, the Disbrow combined churn and butter worker covered by the patent, and also "All subsequent patents for improvements that may be made to it to the Owatonna Manufacturing Company;" that thereafter the Disbrow Manufacturing Company, a corporation organised under the laws of Minnesota, Reuben B. Disbrow being its president and Darius W. Payne is secretary, began the manufacture of certain churns called the Winner or New Disbrow.

The defendant, the Owatonna Manufacturing Company, claimed that this churn was being manufactured under improvements which were patented by Reuben B. Disbrow after the 1893 agreement, and therefore belonged to the Owatonna Company as subsequent patents for improvements. At this time the defendant, the Creamery Company, had a contract, made in October, 1896, with the Disbrow Company for the sale of the Winner churn. It had also advanced money to the Disbrow Company and held a mortgage upon its plant for Eight Hundred Dollars. Litigation arose with respect to the rights of the parties under the agreement of 1893, and several suits were pending in relation thereto, when, in April, 1897, a settlement was effected by the execution of four instruments; one was a contract between the Disbrow Manufacturing Company and the Owatonna Manufacturing Company, in and by which the rights of all parties under the October, 1893, agreement were mutually released, the suits were settled and the Disbrows sold their patents, machines, tools and patterns to the Owatonna Manufacturing Company and retired from the churn business during the life of the patents; another was an assignment of the Disbrow patents; a third was a contract between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, by which the Creamery Package Manufacturing Company was made sales agent for all the churns manufactured by the Owatonna Manufacturing Company; the fourth was a contract between the Disbrow Manufacturing Company and the Creamery Package Manufacturing Company, whereby the agreement of October, 1896, between these parties was released and discharged and the mortgage on the plant of the Disbrow Manufacturing Company was satisfied; the Creamery Package Manufacturing Company greeing to pay to the Disbrows royalties thereafter falling due from have a case where two suits are brought, one by a party to an unlawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them respectively and where both parties were doing nothing more than exercising their legal rights. The mere fact that the Creamery Package Manufacturing Company was a party to an unlawful combination would not deprive it of the right to sue and recover damages against an infringer of petents owned by it, or to bring suit if it believed the patents were being infringed. As was used in Straight v. National Harrow Company, 51 Fed., 519, the owner of a patent having a right to bring suit for its infringement, "The motive which prompts him to sue is not open to judicial inquiry, because having a legal right to sue it is immaterial whether his metives are good or bad and he is not required to give his reasons for the sitempt to assert his legal rights." Connolly v. The Union Sewer

Pipe Company, 184 U. S., 540, and cases there cited.

As suggested by the Circuit Court: "There is no evidence which would justify a jury in finding that the Owatonna Manufacturing Company entered into any agreement or contract with anyone that was in violation of either Section One or Section Two of the Act, w that the Creamery Package Manufacturing Company cannot be held responsible for the failure of the Owatonna Manufacturing Company to maintain its action, and it cannot be held responsible, although it may have entered into an unlawful conspiracy with other persons, for it has not entered into any such conspiracy with the Owatonns Manufacturing Company." The contract of February 24, 1898, between the Creamery Company and other concerns and individuals contained no provision for the bringing of actions against alleged infringers of its patents for the purpose of driving them out of budness, and there was certainly nothing of the kind in any of the contracts made and entered into between the defendants. The mere fact that the two infringement suits were brought upon the same day and the defendants were represented by the same counsel does not show, or even tend to show, that they were brought for any purpose other than the enforcement of the legal rights of the owners of the patents, It falls far short, it seems to us, of establishing an agreement or conspiracy between the defendants to bring these suits at the same time for the purpose of driving the plaintiffs out of business, and after a patient and thorough examination of the record we think the Circuit Court was fully justified in holding that there was no evidence of-fered at the trial "which would warrant the jury in finding that any greement of that kind existed."

As a second basis for the recovery of damages, the plaintiffs contend that the defendants circulated among the agents, users, purchasers and prospective purchasers of the churns of the plaintiffs, located in different states, reports and statements that the combined churns and butter workers sold by the plaintiffs were infringements of the Disbrow patents owned or controlled by the defendants, and that they threatened to bring suits against the users of the plaintiffs'

TOTAL.

That the owner of a patent may notify infringers of his claims,

and warn them that unless they desist suits will be brought to proper him in his legal rights, a sustained by numerous decisions. Felley v. Tuellanti Dress Stay Manufacturing Co., 44 Fed., 19; Computing Scale Company v. National Computing Scale Company, 79 Fed., 962; Farquhar Company v. National Harrow Company, 102 Fed., 714; Adriance, Platt & Company v. National Harrow Company, 121 Fed., 827; Warren Featherbone Company v. Landar, 151 Fed., 180; Mitchell v. International &c. Company, 169

led., 146, 30 Cyc., 1054.

The only limitation on the right to issue such warnings is the squirement of good faith. There is nothing in the warnings given in this case to show that the letters or notices were false, malicious, offensive or opprobrious, or that they were used for the willful purpose of inflicting injury. In such a case it was said, in Kelley v. Tpellanti, supra: "It would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his insention, and to warn persons dealing in the article of the consequences of purchasing from others. Chase v. Tuttle, 27 Fed., 110; Reston Diatite Company v. Florence Manufacturing Company, 114 Mass., 60; Kidd v. Harry, 28 Fed., 723."

There is nothing in this case to indicate that any of the warnings is by the defendants were made in bad faith, and they were comptly followed by the institution of the infringement suits. In issuing notices and warnings we think the defendants were acting within their legal rights. If they had the right to bring the saits they had the right to issue the warnings. It may be, and probably is true, that the pendency of these suits resulted in some damage to the plaintiffs by lessening the sale of the challenged device, but such damage was an incident of the suits and cannot be made the

mais of a recovery.

The conclusion reached is that the Circuit Court properly directed the jury to return a verdict for the defendants and the judgment is Affirmed.

Filed March 23, 1910.

#### (Petition for Writ of Error.)

And on the eighth day of June, A. D. 1910, a petition for writ of error was filed in said cause, in the words and figures following, wit:

United States Circuit Court of Appeals, Eighth Circuit.

D. E. VINTUN and THE OWATONNA FANNING MILL COMPANY,
Plaintiffs in Error,

THE CHAMERY PACKAGE MANUFACTURING COMPANY, THE OWAtonna Manufacturing Company, and Frank La Bare, Defendants in Error.

The above named plaintiffs in error, feeling themselves aggrieved by the judgment and order of the United States Circuit Court of

Appeals, Eighth Circuit, rendered and granted on the 23rd day of March 1910, and filed in the office of the Clerk of said Circuit Court of Appeals, in the above entitled cause, affirming the judgment of the United States Circuit Court, in and for the First Division of the District of Minnesota, in favor of the above named defendants in error, hereby prays the Court for a writ of error to the United States Supreme Court in said cause, and that a transcript of the record and poceedings on which said judgment and order were made, duly authenticated may be sent to the United States Supreme Court, and that a citation be granted directed to the above named defendants in error, commanding them to appear before the United States Supreme Court to do and receive what may appertain to justice to be done in the premises; and also that an order may be made fixing the amount of security which plaintiffs in error shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in the said Circuit Court and Circuit Court of Appeals may be suspended until the determination of the writ of error by the Supreme Court of the United States.

HARLAN E. LEACH, CHARLES I. REIGARD, Attorneys for Plaintiffs in Error.

JAMES F. WILLIAMSON,

Of Counsel.

JAMES A. TAWNEY,
Of Counsel.

On reading and filing the hereto attached petition for writ of error, it is

Ordered That a Writ of Error be, and the same is allowed to have reviewed in the United States Supreme Court the judgment and order rendered and entered herein, upon the plaintiffs in error giving a bond according to law in the sum of \$1000.

It is further ordered that upon the filing of such bond, all further proceeding- in this cause in the Circuit Court and Circuit Court of Appeals be and are stayed until the determination of the said

writ of error by the United States Supreme Court.

# Presiding Justice of the United States Circuit Court of Appeals (Eighth Circuit.)

(Endorsed:) No. 3167. U. S. Circuit Ct. of 'A. Eighth Circuit. D. E. Virtue, et al., v. Creamery Pkg. Mfg. Co., et al. Petition for Writ of Error and Order. Original. Filed Jun- 8, 1910, John D. Jordan, Clerk.

#### (Assignment of Errors.)

And on the eighth day of June, A. D. 1910, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

D. E. VIRTUE and THE OWATONNA FANNING MILL COMPANY, Plaintiffs in Error,

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWAtonna Manufacturing Company, and Frank La Bare, Defendants in Error.

And now comes D. E. Virtue and the Owatonna Fanning Mill Company the above named Plaintiffs in error herein, and say that in the record and proceedings thereunder, there is manifest error in this, to wit:

(1) The Circuit Court erred in directing (on page 569 of the record) the jury to return a verdict in favor of the defendants in

(2) The Circuit Court erred in sustaining (in the next to the last paragraph on page 564 of the record) the objection of the defendants in error to the offer of proof made by plaintiffs in error three-fifths of the way down from the top of page 557 of the record, which offer

of proof is as follows:

Mr. Leach: We offer to prove that the interstate commerce and trade of these two plaintiffs Mr. Virtue and the Owatonna Fanning Mill Company were taken away and destroyed and damaged by the prosecution of these two suits, one brought by the Owatonna Manufacturing Company, and one brought by the Creamery Package Manufacturing Company."

(3) The Circuit Court erred in sustaining (in the second paragraph from the bottom of page 564 of the record) the objection of the defendants in error to the offer of proof made by plaintiffs in error at the bottom of page 557 of the record, which offer of proof is

"Mr. LEACH: I will add that the plaintiffs have thereby sustained

the damages claimed by them in the complaint."

(4) The Circuit Court erred in sustaining the objection of the defendants in error to "Q. 81" on page 457 of the record (asked to show that the churns sold by plaintiffs in error did good work). which question is as follows:

"Q. 81. Those Owatonna combined churns and butter workers which you say are still in operation, what kind of work have they

been doing?"

(5) The Circuit Court erred in sustaining the objection of the defendants in error to the first question appearing at the top of page 567 of the record (relating to the nature and extent of the business of the plaintiffs in error which was destroyed by defendants in error), which question is as follows:

"Q. And at the time you quit or just before that time, what kind

of a business did you have?"

(6) The Circuit Court erred in the following respect:

On page 557 of the record is the following conversation between

the Court and counsel for plaintiffs in error (at the middle of said

page 557), to wit:

"Mr. LEACH: We offer to prove now that the interstate business of the plaintiffs was destroyed and taken away by the acts of the defendants, as set out in the complaint. We claim also that it was done not only by bringing these two suits, but also by these reports and rumors which were circulated round by the agents of the Creamery Package Manufacturing Company."

The Court: I think that had better be in a separate offer, if you make an offer to show damages by the institution of these two suits."

Then at the bottom of page 568 of the record, counsel for plaintiffs in error offered to prove that on account of said "reports and rumors which were circulated round by the agents of the Creamery Package Manufacturing Company" (as mentioned in the last above quotation from the record), the plaintiffs in error sustained the damages to their interstate business mentioned in the last above quotation, which offer of proof of the plaintiffs in error appears in the last line at the bottom of said page 568 and in the first four lines at the top of page 569 of the record, in these words, to wit:

"Mr. LEACH: With regard to those rumors and the other things which the court mentioned, we think we have shown enough of these to entitle us to damages, it being in restraint of trade. We have connected those rumors with the defendants in such a way as they

would be liable to us in this case for damages."

The Circuit Court refused, at the top of said page 569, to permit the plaintiffs in error to make said proof. In this the Court erred.

(7) The Circuit Court erred in sustaining the objection of the defendants in error to the last question on page 242 of the record herein, which question is as follows, (relating to the contract Exhibit "C" attached to the complaint):

"Q. You knew of a certain contract made between the Cornish, Curtis & Greene Mfg. Co. and the Creamery Package Manufacturing Company, D. E. Virtue and Martin Deeg of Owatonna, sometime

in 1900, or about that time?"

(8) The Circuit Court erred in sustaining the objection of the defendants in error to the questions on page 244 and on page 245 and on the first half of page 246 of the record herein (said questions relating to said contract Exhibit "C" attached to the complaint and as to the acts and conduct of the defendants in error in reference to said contract).

(9) The Circuit Court erred in sustaining the objection of the defendants in error to the third question on page 248 of the record (asked to show that the said contract Exhibit "C" was never carried out by the Creamery Package Manufacturing Company), which

question is as follows, to wit:

"Q. Do you remember the contract never was carried out, Mr.

(10) The Circuit Court erred in sustaining the objection of the defendants in error to the first question at the top of page 324 of the record (said question relating to an oral statement of an alleged co-conspirator), which question is as follows:

"Q. What did you say to Mr. Howe about these two suits, and

what did he say to you?"

(11) The Circuit Court erred in sustaining the objection of the defendants in error to the offer of proof made by the plaintiffs in error, as appears at the middle of page 325 of the record herein (relating to a statement of an alleged co-conspirator).

(12) The Circuit Court erred in sustaining the objection of the defendants in error to the question at the middle of page 334 of the moord (calling for a statement of an alleged co-conspirator), which

mestion is as follows:

"Q. What was that talk, Mr. Holman?"

(13) The Circuit Court erred in sustaining the objection of the defendants in error to the question two-thirds of the way down from the top of page 432 of the record (calling for a statement of an alleged co-conspirator), which question is as follows:

"Q. You may state what that conversation was?"

(14) The Circuit Court erred in sustaining the objection of the defendants in error to the last question on page 493 of the record (calling for a statement on an alleged co-conspirator) which question is as follows:

"Q. Will you tell us what it was that Mr. Howe told you upon that

necasion?"

(15) The Circuit Court erred in sustaining the objection of the defendants in error to the question two-fifths of the way down from the top of page 534 of the record (calling for a statement of an alleged co-conspirator), which question is as follows:

"Q. Give the substance of that conversation?"

(16) The Circuit Court erred in sustaining the objection of the two defendant corporations to "Q. 13" near the top of page 549 of the record (said question calling for a statement by the defendant Frank La Bare), which question is as follows:

"Q. What did he say?"

(17) The Circuit Court erred in sustaining the objection of the two defendant corporations to "Q. 14" about two-fifths of the way down from the top of page 549 of the record (said question calling for a statement of the defendant Frank La Bare), which question is m follows, to wit:

"Q. 14. Give the substance of it?"

(18) The Circuit Court erred in sustaining the objection of the defendant in error The Creamery Package Manufacturing Company to the second question from the top of page 435 of the record (calling for a statement of the defendant Frank La Bare), which question is as follows, to wit:

"Q. Now will you tell the conversation which took place between

yourself and Frank La Bare at that time?"

(19) The Circuit Court erred in sustaining the objection of the defendants in error to the question two-thirds of the way down from the top of page 433 of the record, which question is as follows, to

"Q. You may state what that conversation was?"

(20) The Circuit Court erred in sustaining the objection of the

defendants in error to the question in the third line from the top of page 434 of the record, which question is as follows, to wit:

"Q. You may state what that conversation was?"

(21) The Circuit Court erred in striking out, at the top of page 436 of the record, the testimony of the witness as to statements (given at the middle of page 435 of the record) made by the defendant La Bare to said witness, which evidence so struck out is as follows:

"A. Mr. La Bare came into my office and requested me, he wanted me, he first said that my brother was coming as a witness, and that he was on the road and was going to start from Las Vegas on such a date on such a train, and he wanted me to go to Omaha and meet him, and see if I could not kind of induce him that he had better stay there and not come any further, I told him I wouldn't do it, that I wouldn't have anything to do with it. I didn't want to go away. He finally insisted that it was my duty to help in this suit, as I was drawing royalties through the Disbrow Manufacturing Company on the Disbrow churn, and that I ought to go there and get him to stop off at Mankato where Mr. Paul the lawyer for the Creamery Package Manufacturing Company could meet him and talk with him before Mr. Virtue saw him. That was his words to me."

(22) The Circuit Court erred in sustaining the objection of the defendants in error to the offer of proof of the plaintiffs in error, appearing two-fifths of the way down from the top of page 568 of the record, (an offer to show that the plaintiffs in error never infringed any patent mentioned in the bill of complaint in said suit brought by the Owatonna Manufacturing Company against the plaintiffs in

error herein), which offer of proof is as follows:

"Mr. Leach: We now offer to prove that the plaintiff the Owatonna Fanning Mill Company never at any time by anything that it did infringed any patent mentioned or sued upon either in the case brought by the Owatonna Manufacturing Company against Mr. Virtue and the Owatonna Fanning Mill Company, or any patent sued upon or mentioned in the bill of complaint brought by the Creamery Package Manufacturing Company against Mr. Virtue and the Owatonna Fanning Mill Company."

(28) The Circuit Court erred in sustaining the objection of the defendants in error to the offer of proof appearing three-fifths of the way down from the top of page 568 of the record, (an offer to show that the plaintiffs in error never infringed any patent mentioned in the bill of complaint in said suit brought by the defendant in error the Creamery Package Manufacturing Company against the plaintiffs in error herein) which offer of proof is as follows:

"Mr. LEACH: We separately offer to prove that the plaintiff and the Owstonna Fanning Mill Company never at any time infringed any patent mentioned in the bill of complaint in the case of the Creamery Package Manufacturing Company against the Owstonna Fanning Mill Company and D. E. Virtue, which bill of complaint is Exhibit E-1, attached to the complaint in this case."

(24) The Circuit Court erred in sustaining the objection of the

defendants in error to the offer of proof of the plaintiffs in error, appearing at the bottom of page 568 of the record, (an offer to show that the plaintiff D. E. Virtue never infringed any patent mentioned in the bill of complaint in said suit brought by the Creamery Package Manufacturing Company against the plaintiffs herein), which offer of proof is as follows:

"Mr. LEACH: We also offer to prove that Mr. D. E. Virtue never at any time infringed any patent or any letters patent mentioned or described or set forth in the bill of complaint of the Creamery Package Manufacturing Company, which is attached to the bill of

complaint in this case, and is marked Exhibit E-1."

(25) The Circuit Court erred in sustaining the objection of the defendants in error to the offer of proof made by Mr. Williamson at the bottom of page 551 of the record and in the first four lines at the top of page 552 of the record, which offer of proof is as fol-

lows:

"Mr. WILLIAMSON: We offer to prove that the mechanism disclosed in and covered by the Howe, Ames and La Bare patent, under which the so-called two speed case was brought by the Owatonna Manufacturing Company against the defendants D. E. Vitrue and the Owatonna Fanning Mill Company was for a mechanism which had been disclosed to said Howe, Ames and La Bare, by Reuben B. Disbrow and Darius W. Payne, and was put into a machine which was ultimately made by the Owantonna Manufacturing Company in accordance with the directions of said Reuben B. Disbrow; and that mid T. J. Howe and the officers of the Owatonna Manufacturing Company, knew at the time they instituted this suit against said defendants that said patent was void, and was something which had been communicated by others."

(26) The Circuit Court erred in sustaining the objection of the defendants in error to the offer of proof made by Mr. Williamson beginning in the eighth line on page 552 of the record, which offer

of proof is as follows:

AMr. WILLIAMSON: I also offer to prove that they knew that said Howe, Ames and La Bare were not inventors, but that the same had been communicated by said Reuben B. Disbrow and Darius W. Payne, and that they purposely and intentionally appropriated the rights of the inventors, and procured a patent on the same, surreptitiously and contrary to law; and that they knew that this payent was void when they instituted this suit."

(27) The Circuit Court erred in refusing to grant a new trial

erem.

(28) For the reasons aforesaid, the United States Circuit Court of Appeals (Eighth Circuit) erred in affirming the judgment and

order of the said Circuit Court.

Wherefore, the plaintiffs in error, D. E. Virtue and the Owatoma Fanning Mill Company, pray that the judgment and order of the said Circuit Court of Appeals, Eighth Circuit, be in all things aversed, and that such disposition may be made of this cause as

# (West of Bevor.)

And on the eighth day of June, A. D. 1910, a writ of error from the Supreme Court of the United States was filed in said cause, the original of which with the Clerk's return endorsed thereon is hereto attached and herewith returned:

University States of America, se:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between D. E. Virtue and The Owatonna Panning Mill Company, plaintiffs in arror, and The Creamery Package Manufacturing Company, The Owatonna Manufacturing Company, and Frank La Bare, defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct this error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of June, in the year of our Lord one thou-

send nine hundred and ten.

[Seal of the Supreme Court of the United States,]

JAMES H. McKENNEY, Clerk of the Supreme Court of the United States.

Allowed by

JOHN M. HARLAN,
Associate Justice of the Supreme
Court of the United States.

[Endorsed:] No. 3167. D. E. Virtue, et al., Plaintiffs in Error, Oreamery Package Manufacturing Company, et al. Writ of Drees. Filed Jun-8, 1910. John D. Jordan, Clerk.

# Return to Writ.

THEY BOTATES OF AMERICA, Eighth Oirouit, es:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case,

with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the sal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of June, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN. Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

## (Citation.)

And on the eleventh day of June, A. D. 1910, a citation on writ of error from the Supreme Court of the United States was filed in d cause, the original of which with the admission of service endered thereon is thereto attached and herewith returned:

United States of America, M:

To the Creamery Package Manufacturing Company, the Owatonna Manufacturing Company, and Frank La Bare, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein D. E. Virtue and The Owatonna Fanning Mill Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 1st day of June, in the

year of our Lord one thousand nine hundred and ten.

JOHN M. HARLAN. Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 3167. D. E. Virtue et al., Plaintiffs in Error, Creamery Package Manufacturing Co. et al. Citation. Filed Jun- 11, 1910. John D. Jordan, Clerk.

Service of the within citation, by copy, on the 8th day of June, 1910, at city of Minnespolis, Minnesota, is hereby admitted.

EMANUEL COHEN,
JOHN B. ATWATER,
FRANK W. SHAW,
Attorneys for Creamery Package Mfg. Co.
W. A. SPERRY,
A. C. PAUL.

A. C. PAUL, Att'ye for Owatonna Mfg. Co. and Frank La Bare.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein D. E. Virtue and the Owatonna Fanning Mill Company were Plaintiffs in Error and The Creamery Package Manufacturing Company, Owatonna Manufacturing Company and Frank La Bare were Defendants in Error, No. 3167, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return endorsed thereon and the original citation with admission of service endorsed thereon are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of June, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of

Olerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 22,229. U. S. Circuit Court Appeals, 8th Circuit. Term No. 324. D. E. Virtue and The Owatonna Fanning Mill Company, plaintiffs in error, vs. The Creamery Package Manufacturing Company, The Owatonna Manufacturing Company, and Frank La Bare. Filed June 20th, 1910. File No. 22,229.



## UNITED STATES SUPREME COURT.

E. Virtue, et al., Plaintiffs in Brror,

W.

a Creamory Package Manufacturing Company, et al., Defendants in Herer

## BRIEF OF PLAINTIFFS IN BRROR.

(The releases are to page of the Printed Second unless others

(Plaintiffs in error will be called plaintiffs. Defendants in er-

## STATEMENT OF THE CASE

This is an action brought to recover damages under the 7th

Spinisher came of action in hand on the following facts of the facts of the

The Oreamery Package Manufacturing Company a corporation of Chicago (one of the defendants herein). (Engaged in manufacturing and selling dairy and creamery supplies of all kinds, except that prior to Feb. 24, 1898. this company was not manufacturing any combined churn and butter worker, but was acting as the sales agent for the Winner or New Disbrow churn, made by No. 8 below. From and after about that date, this company was selling as exclusive sales agent, the Disbrow combined churn and butter worker, made by No. 9 below and was both manyfacturing and selling the Victor combined churn and butter worker which, prior to that date, was made by No. 4 below).

2. The Cornish, Curtis & Greene Manufacturing Com-May, a corporation of Fort Atkinson, Wisconsin, (Manufacturing and selling dairy and creamery supplies of all kinds including the Wisard combined churn and butter-

worker).

The Cornish, Curtis & Greene Company, a corporation of St. Paul. Minnesota. (Not manufacturing, but

was a sales agency of No. 2. above).

The P. E. Parge & Company (of Lake Mills, Wisconsin), a corporation of Lake Mills, Wisconsin. (Mannfacturing and selling dairy and creamery supplies of all

kinds, including the Victor churn and butter worker).

5. The F. B. Farge & Company (of St. Paul, Minneseta), a corporation of St. Paul, Minneseta. (Not mann-

facturing, but was sales agency of No. 4 above).

urber à Ö my, a corporation of Chi-(Manufacturing and selling ereamery and dairy supplies, including the Barber combined churn and butter

7. C. E. Hill & Company, a partnership, composed of L. H. Hill and Fred Macnish, located at Kansas City, Mis-(Manufacturing and solling dairy and oreamery

int not churns).

turing Company, a corpora-(Manufacturing and solling tion of Mank ww combined churn and only the

(Manufacturing and selling th and butter worker).

(For the value of the plants, fixtures and tools of the first 7 heve, see 57-a and 56-a of Record.)

altere is president of No. 9 above. to are dead, and this action discontin-

certain officers of the Creamery Package Mana, together with officers of the Owatonna Manay, went to Monkato and procured a series of co

tracts from the Disbrow Manufacturing Company (No. 8 above), in and by which the last named company turned over all its property to the Owatonna Manufacturing Company, and the Disbrow Manufacturing Company, and its officers, agreed in these contracts that they would not thereafter "engage in the churn or butter worker bus either manufacturing or selling \*\*\*\* during the life of said ais or this contract," (P91-b.) (These contracts are at p.89 s, either manufacturin 01.) One of the officers of the Creamery Package Manufacturing Company stated, in connection with this transaction, that this "would eliminate competition" (see p. 22-b of attached brief,) and that one of the objects of this deal was to "eliminate the compe at at that time existed between the Owatowna Manufacturing upany and the Disbrow Manufacturing Company" (see p. 22-a of attached brief.) At the time these contracts were made, certain litiation was pending, brought by the Owatonna Manufacturing Company against the Disbrow Manufacturing Company, the former claiming that the latter was infringing upon its right in manufactwing and selling churns. This litigation was never brought to a deeree, but was settled by a clause in these contracts (p. 90-c and 95-s of Record.) The Creamery Package Manufacturing Company was a party to some of these contracts, and in them it agreed to, and hereafter did, act as the exclusive sales agent of the Owatonne Manufacturing Company, and discontinued acting as the sales at of the Disbrow Manufacturing Company, and in those contracts the Creamery Package Manufacturing Co. agreed to turn over direct to Disbrow Company certain royalties, as they should become du m time to time, on the churns made by the Owatonna Manufac uring Co. and furnished to the Creamery Package Co. (instead of paying those royalties to the Owatonna Mfg. Co. and the latter commy paying them to the Disbrow Company,) the Creamery Pask Company to deduct those royalties from the price it should pe the Owatonna Mfg. Co. for the churns. Exhibit B(1), p. 69-74 khibit B(9), p. 89-96, Axhibit B(10), p. 97-99, Exhibit B(11), p.

Thoreafter, on February 24, 1898, the above named Cream ackage Manufacturing Company took over all the properties of the t 7 of the above named concerns, (p. 48, 44), and in consideration the same issued to the owners of said 7 concerns certificates or area of its capital stock, and thereafter (except as otherwise nafter stated) continued to operate and control all of erns, under the names theretofore used by said hown, and at the same places as above stated, a done under one contract, Exhibit A attache nt, pages 41-56 of record. That the object of this deal was out the competition theretofore existing between the concerns, and to raise the prices on creamery of attached brief. Prior to February 24, 189 stween these concerns had been very strong. es of record—276-c, 278a, 280-b. This ec ntense" (p. 208-a) and "Acres" (p. 207-b.) mary 24, 1886, wiped out 2-3 of that competition envered by patents, and practically destroyed all envered by patents, P. 286-b of Record, "Examination"

articles covered by patents, including combined churns and butter workers.

Thereafter, on June 4, 1898 (3 months and 8 days after the date of the above big contract,) the two defendant corporations made and entered into, and thereafter executed and earried out, what is known as the "45-55" contract (Exhibit B-4, pages 77-84 of Record.) This contract provided that the defendant Creamery Package Manufacturing Company should manufacture not more that 45 pe sent of all combined churns and butter workers to be sold by i and that the defendant Owatonna Manufacturing Company should manufacture and furnish to the defendant Creamery Package Man ufacturing Company at least 55 per cent of all combined churns and butter workers sold and to be sold by the latter, the latter company to continue as the exclusive sales sgent of the former. The prices at which the churns made by the Owatonna company should be sold to the users was left entirely to the Creamery Package Company, the latter company to take the churns from the former company at certain list prices. See p. 69-b and c, 70-a, 80-a and b. agreements were made between the two defendant corporations at these two main features were zever changed.

By these means the two defendant corporations eliminated ctition and acquired a monopely in the business of manufac and selling combined churns and butter workers, and the deant Creamery Package Manufacturing Company also secure propoly in other dairy and creamery supplies and in the bus of installing complete outfits. This monopoly ranged from & cent to 100 per cent in Minnesota, South Dakota, North Dakota ern Iowa and upper Michigan (pages 15-17 of at i brief); and the defendant Creamery Package Manufacturing any raised the selling prices on all said articles from 10 to 3 mt (p. 19 and 20 of attached brief.)

nent to February 24, 1898, the Creamery Package Manu spany bought out and took over several other of it A list of these is on page 18 of attached brief. Th deals was made in October, 1906 (p. 378-a of Record.)

tage Manufacturing Company continued t some bought out at their diffi ages 18 and 14 of attached ferent names as if travarrange and put in different hi

m (Simples Churn) made by le Falls, N. Y.) w amory Package Manufacturing g a contract with D the churus in this territory (page 17 of a

in the February 24, 1866, contract that named in that contract and taken over by nfacturing Company (with

sip of C. E. Hill & Company should dissolve (p. 12 and 13, attached brief.) We consider this equivalent to an agreement that all these encerns ever thereafter remain out of business. The corporation not to be dissovled was A. H. Barber & Co., and this for the reason that this company was doing a commission and brokerage business, as well as a dairy and creamery supply business, and the commission and brokerage business was not to be interfered with. "A. H. Barber & Co." was left free to continue in the commission and trakerage business, and what had formerly been its dairy and greamery supply business was thereafter conducted, by the Creamery Package Manufacturing Company, under the name of "A. H. Barber Manufacturing Company," a mere name invented and used

the Creamery Package Company.

The purposes and object of the foregoing is well shown by the lowing, appearing largely from the testimony of Mr. Frink (p. 322 of Record): Negotiations for this combination were conduct d about five months prior to the big contract of Feb. 24, 1898 (p c, 281-a). It was to "Eliminate competition and get es for creamery supplies' (282-a). They kept and used mer names of the different concerns to conceal the combina er fear of publicity (p. 282-b, c. 283-a). They also used these for s in catalogues and circulars (283-a). The idea was to c r one mexagement all the patents belonging to all these di concerns which went into the combination and they could the trol combined churns and butter workers and many other pa articles which went to furnish a creamery and could thereby the dairy and creamery supply business, and could elimit titors, for the reason that such competitors could not get es covered by patents and could not bid on the putting in supplies or complete creamery outfits (p. 284-b, 285-b,). About two-thirds in value of all the article into a creamery were patented articles; the others articles (305-c.) Thus the combination could ly in the furnishing of articles not es ed articles. After they had urus and butter workers and they could and did suppress

the dairy commissioners" (p. 814-b, c). The Victor and the Dis brow churns had 90 per cent of the total churn business in the comtry (p. 314-b, c). This was talked over at a meeting of the committee on patents of those people who went into the combination (p. 314-c.) They collected all the patents that this witness Frink ever heard of and he gave particular attention, on behalf of the combination, to is question of patents (p. 317-c, 318-a,b, e). They looked over all that they "thought covered the field" (p. 317-c). Mr. Fargo said, in reference to those patents, "Here is all of them" (p.818-b). sa was "that they would shelve" all the rest of the patents an chines covered by the patents except the Dishrow and the Victor 320-b, e). They thought concerning these patents "if we were um all together in one firm, we thought that we would o d"for the reason that"the patents were so broad" (p. 311-e was argued "that the patents already on on emitre field" (p. 311-b). Some of those who went into ne desired that they manufacture and sell three churns ins m" (p.821-b), two, so as to make "more apparent competition a not done. The collection of patents for this combination w a patent attorney of Milwaukee (p. 318-c, 319-b). As agreement was made, the defendant Creamery Pack Company measured up its Victor churns and m numbers on those churns correspond with the pr shrow churns, and thereafter both the ed that the capacity of the eacity of the Die

There was one other law suit gending prior to Pub. \$4, 1866. This was a suit brought by the Owelenkas Manufacturing Company against the F. R. Furge & Company, to compact the latter company to discentiate the manufacturing of "Bigle &" unit "Bigle &" and the B" chose No decree, except a preliminary in junction was back in the company.

at the time of the monney (p. 1984a).

We wish to call the particular attention of the court to the dethat in this "GAG" contract between the two delendant corporations, there is a classe that the defendant (Irvatorus Epandectories Company shall preserve all intringers of its patents and that the detendant Creamery Puckage Reconfecturing Company green is given to the Creatorus Manufacturing Company (any panella american

This was the citation when these two plaintiffs began the mas utseture and sale, under certain patents, of their combined cours and batter workers, made at Owntonne, Minnessia. These plaintiff sequired, prior to July 16, 1904 (553-a), a considerable state and interstate commerce and trade in this business, making their churns in Owatonna and shipping them from there by common carrier to different places in other states and selling the same to uners in those sher states. They had an interstate commerce and trade extending from Owatonna, Minnesota, into the states of Iowa, New York, Michan, Illinois, Washington, Missouri and Tennessee (p. 554) and

South Dakota (468-c).

Defendants ascertained this and Mr. Cooper, the manager of the Minneapolis house of the Creamery Package Company, went to Owaunna in May or June of 1904 (515-c, 520-c) and sought to have these
hintiffs "quit making makines and to handle the Dishrew meable
hit Covatenna territory" (526-b). (These Dishrew machines were
is once made by defendant Owatonna Manufacturing Company and
said by defendant Creamery Package Manufacturing Company).
This Mr. Cooper on this trip to Owatonna said to Mr. Virtue. "We
take we even the creamery Package Manufacturing Company as well
as the defendant Creamery Package Manufacturing Company as well
as the churus made by the defendant Owatonna Manufacturing Company, and he says to the plaintiff Virtue. "You are making a claim
in you had better take the Dishress churu and make the
rith us." (p.518-a). Plaintiff Virtue told this Mr. Cooper that the
piece the Creamery Package Manufacturing Company were using
their goods were too high, and Mr. Cooper replied that the
their goods anywhere cles (p. 518-a,b). These plaintiffs refused to
ps into any deal with the Creamery Package Manufacturing Company were using
the goods anywhere cles (p. 518-a,b). These plaintiffs refused to
ps into any deal with the Creamery Package Manufacturing Company, and refused to discontinue the manufacture and mis of this
make, and refused to discontinue the manufacture and mis of this
make, and refused to discontinue the manufacture and mis of this
make, and refused to discontinue the manufacture and mis of this

Mily "ant of hudness" (548-b).

Alam just prior to the time these phalatiffs began the week deepen at the distance of the party of the party of the fraction (San) distance at the party of the party of the first

And about the same time, Mr. Higgs (an officer of and representing the Creamery Package Co.,) stated to this same Mr. Heeg as follows:

"We don't care to buy any more patents, we own the Dishrow patent and we own the Victor patent, and we own so many patents that we own enough patents to make anyhody trouble that goes to work and puts up a combined churn and butter worker." (583-b.)

Thereafter these plaintiffs continued their interstate commerce and trade until they were wholly driven out of business by the acts

of defendants as follows:

On July 16, 1904, the defendants started two infringement suits against these plaintiffs, one brought in the name of the defendant Owatonna Manufacturing Company on a patent claimed by that company, and one brought in the name of defendant Creamery Package Manufacturing Company, on three different patents claimed by that company.

The suit brought in the name of the Owatonna Manufacturing Company resulted in a final decree (Jan. 25, 1907) in favor of these plaintiffs and against the defendant Owatonna Manufacturing Company. The decree is that the patent sued on in that case was "void for lack of invention, in view of the prior art" (194-a). (A same

organ padent).

The suit brought in the name of the defendant Creamery Puchage Manufacturing Company resulted in an interlocationy degree (Jan 28, 1907), holding that these plaintiffs infringed certain claims in each of the three patents sued on and sending the case to a master in chancery to "state and report" to the court "stall as count of the famours restained by the complainant and a full or court of the profits gains and advantages realized by these plaintiffs "from the said infringement" (161-b). This accounting has now been had the master has never made his report and this case

is still neading before him.

the two cases served upon plaintiffs at the same time, the subposens in the two cases prosecuted together from beginning to each the same attorney appearing for the two complainants. The axes damages may alleged in the bill of complaint in each soit to will the complainant in each alleged that the coital demages in multiplied by three (107- and 188-c), and alleged that the coital demages in multiplied by three (107- and 188-c), and alleged that in addition thereto each complainant receives the two soits were coarded by these plaintiffs and only of suit. After the two soits were coarded against these plaintiffs, his Williamon, the alternoon these plaintiffs, his Williamon, the alternoon of the coarded the palents on churus and (with the coarder or at the request of these plaintiffs), and inhibited them is life. For the suits in the coarded the property of the coarded that the two the two coarded to the property of the coarded the coarded that the two the two coarded to the coarded that the two the two coarded to the coarded that the coarded the two coarded that the coarded the two coarded the coarded that the coarded the two coarded that the coarded the coarded that the coarded the coarded the coarded that the coarded the two coarded the co

ant Mr. Williamson this letter on Oat. 17. 1904, to wit: "I am going a Chicago Wednesday night to consult with my Chicago elient in reference to the chura suits. I will wire you from Chicago Thursday afterness." (572-c.) Thereafter, and on October 20, 1904 Mr. Williamson received from Chicago the following telegram at Minnespolis: "Will proceed with both suits. A. C. Faul." (573-a). This telegram appears to have been received at Minnespolis at "10-30, 1904" (573-a). This was in the forence of the "Thursday" mentioned in Mr. Paul's letter to Mr. Williamson above quoted.

Again calling the attention of the court to the "to-56" contract. letter and telegram is evidence, plaintiffs contend, that the amery Package Company was not only assisting the Owatonna mufacturing Company, but was dictating, under the clause in that atract which required the Owatonna Manufacturing Company to secute infringement suits and required the Creamery Package npany to render assistance in such prosecutions. During the pros tion of these two suits, the agents and officers of these two de dant corporations were frequently present at the taking of timeny, and they appeared to be consulting together with orney (544-b, e), and at times this occurred while testimony ag taken which applied only to the case brought in the na Owatonna Manufacturing Co. (544-b, c). After the final favor of these plaintiffs in the one suit and the interlocutor against these plaintiffs in the other suit, the Creamery Pa excented to the Owatonna Manufacturing Co., an ass

il the taxable costs in its suit (147-o, 148).

Also both before and after the beginning of those two mitted spainst these plaintiffs, the attorneys for the two defendant corporations, and the traveling agents of the defendant Creamery Fighter Company, circulated reports and statements that the machine sale and sold by these plaintiffs were an infringement upon patching and old by the two defendant corporations, and threatened infringement suits and actions for damages against meers of plaintiffs interests and against plaintiffs' prospective outdomers. These reports interests and threats were avoidated in Minneages, south Dahota and Michigan and Illinois. Also during the pundonsy of those two the secounts were published "continuity" and "every little wife" (405-a) in some of the pages in Minneages, south Dahota in St. Juni Piencer Frem and the Minneages. Tribune, and these suppages and a constitutional description of threatests and the authors (405-a). This cond-accounts were published from time to be a particular to the states (406). This circulation of threates and come direction in cities extensed them the suits took away plaintiffs agents and intringement, and threats of mits took away plaintiffs agents and intringement, and threates a mit took away plaintiffs agents and intringement, and threates a mits took away plaintiffs agents and intringement, and threates a mits took away plaintiffs and come of the states (406). This circulation of threates and greeness and threates and days were the states (406), the states and circulation of threates and greeness and threates and constitutes in the states and circulation in Minneaeta and come of the states and continues and constitutes and circulation of threates and circulation and threates and constitutes in finite and continues and constitutes and circulation and threates and constitutes and circulation and circulation and constitutes and circulation a

(468-c), stated that he heard an agent of the the Creamery Package Company (Issae Woodring) state, in the presence of the "full creamery board" consisting of five or seven persons 473-a,b) at Newell, state of Iowa, at the Coon River Creamery (469-a,b,) as follows: "He Mr. Woodring, told this creamery board that this churn was an infringement on the Dishrow patents owned by the Oreamery chage Manufacturing Company and that if they used this chura they would be sued for infringement' (486-c, 487-a). The Creamery package Company never owned any Disbrow patent, and never had any claim thereto; the Disbrow patents were owned by the Owstonna Manufacturing Company; these plaintiffs were never sued on any Disbrow patent. The patents involved in the suit brought in the name of the Creamery Package Manufacturing Company were the Victor patents, and the patent involved in the suit brought in the name of the Owatonna Manufacturing Company was the Howe, Ames La Bare patent. The above statement of Woodring was not true in two different particulars: First, these plaintiffs did not infringe the Dishrow patents. Second, the Dishrow patents were not owned by the Creamery Package Company. Plaintiffs contend that the reason these statements were made in that way is because the Disbrow churns were well known throughout the country, and to state that the Disbrow patents were being infringed would, for that reason. be rapre effective, and that it was also considered to be more effective to have it appear that those patents were owned by a large and powerful Chicago corporation which was financially able to and would energetically prosecute infringement suits and actions for damages.

These plaintiffs spent large sums in defending those suits and were driven out of business entirely by the prosecution of those suits and by the circulation of those reports, statements and threats. They had their customers and agents and agencies taken away and de-

stroyed and ecased business entirely.

Plaintiffs established all the foregoing on the trial of this case with the exception of the damages sustained by them and made offers of proof of damages, to which offers of proof defendants objected, and the court sustained the objections, and plaintiffs excepted. The trial court sustained these objections for the reason that the damages sustained by plaintiffs, to use the language of the trial court, "are not

such damages as are contemplated by the Act" (567-c) ..

Plaintiffs offered to prove on the trial that they never infringed any patent sued on in the suit brought in the name of the Creamery Package Company, and that they never infringed the patent sued on in the suit brought in the name of the Owatonna Manufacturing Company, and that the Owatonna Maufacturing Company surreptitiously accured its patent, and that the officers of the last named company knew that patent was void when they brought their said suit on it. These offers were objected to, the objections sustained, and plaintiffs took exceptions.

The churn made by these plaintiffs was called the Owaicuta

combined churn and butter worker.

At the end of attached brief is an index to the complaint (except exhibits).

## ASSIGNMENTS OF ERROR.

Plaintiffs adopt the assignments of error urged in the circuit sourt of appeals, as set out at pages 37-44 (bine sheets) of the attachad brief. One additional assignment of error is urged in this court, to-wit:

The United States Circuit Court of Appeals (Eighth Circuit) erred in affirming the judgment and order of the said Circuit Court. P

of Record.)

#### ARGUMENT

(This argument is in addition to that at pages 45-102 of annexed

brief.)

The contracts, conspiracy and combination of the two defendant corporations are clearly illegal, under both sections 1 and 2 of the anti-trust aet and also at common law. (In so far as there is any question about the purpose and intent of defendants in doing what they did, it was a question for the jury).

(Authorities at pages 45-47 of annexed brief, and following

ases:)

Continental Wall Paper Co. v. Louis Voight, etc. Co. (1909), 212 U. S. 227, 29 S. Ct. 280, 53 L. ed 486.

Standard Oil Co., v. United States, 221 U.S. 1, 31 S. Ct.

Rep. 502, 55 L. ed 619.

United States v. American Tobacco Co., 221 U.S. 106, 55 L.

ed. 663, 31 S. Ct. Rep. 632.

Syl: "5. The acquisition of dominion and control over the tobacco trade by a principal and accessory or mosidiary corporations as the result of purchasing numerous competitors, in many cases closing out the business when acquired, and of obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the successful manufacture of sobacco products, brought about in many cases after a ruinous trade war, the parties in interest uniformly covenanting not to engage in the tobacco business, and the former business often continuing estencibly as an independent concern, violates the prohibitions of the act of July 2, 1890, Seca. 1, 2, against combinations in restraint of trade or commerce, or monopolisation or attempts to monopolise any part thereof, whether looked at from the point of view of stock ownership, or from the standpoint of the principal and accessory or subsidiary corporations, viewed inde-pendently, including certain foreign corporations in so far as, by contracts made by them, they became co-operators in the combination."

State of Minnesota v Creamery Package Manufacturing Co., 110 Minn, 415, 437, 126 N. W. 126, 623, 115 Minn. -132 N. W. 268.

The only title the Creamery Package Co. ever had to the Victor

patents, on which patents alone was based the suit brought by that company against these plaintiffs, was such title as the Creamery Package Co. obtained by and through the contract of Feb. 24, 1898. At the time of the making of that contract, and prior hereto, those patents were owned by F. B. Fargo & Co., and were conveyed by and contract, as shown at pages 43-c, 44-c, 47-a, 52-a,b,c, 53-a, 55-c. If there were assignments of patents executed, they were made only pursuant to the terms, and as a part, of said contract, as shown at page 52 and 58-a. The second deposition of Mr. F. B. Fargo shows that the Victor patents were transferred to the Creamery Package Co. by this agreement of Feb. 24, 1898. Pages 487-c, 488, 489, 490, 491 of Resord.

This Feb. 24, 1898 contract being illegal and void, under the Sherman act or at common law, the Creamery Package Co., acquired no title whatever to those Victor patents and had no right or authority to prosecute any suit thereon against these plaintiffs.

(See authorities, p. 48-50, attached brief, and following author-

Continental Wall Paper Co. v. Louis Voight, etc. Co. (1909), 212 U. S. 227, 29 S. Ct. 280, 53 L. ed 486.

In this case the court held (affirming the Circuit Court of Appeals) that plaintiff could not establish its cause of action, and had no title to the cause of action, except through or by relying on the illegal agreement, and that to permit plaintiff to succeed would be for the court to aid in the carrying out of the illegal agreement and conspiracy; the court refused to lend its aid to the perfeeting of a criminal conspiracy prohibited by the Sherman Anti-Trust Law. The dissenting opinion written by the late Justice Brewer is only to the effect that the defense set up should be overruled on the ground that such defense "did not seek to recover threefold the damage it had anstained, but only to avoid paying for the property had purchased." This dissenting opinion holds that the remedies provided by this law are exclusive; for, to further qualit the language, "Now, the remedies given in the anti-trust act are three in number: Pirst, a criminal proceduce; second, a forfeiture of property; and, third, as action by any person injured to recover threefold the damages by hirs sustained. These being the remedies pre-scribed, are exclusive." Of course this language has so application to the case at bar, for this is an action to recover the threefold damages.

Peck v. Henrick, 167 U. S. 624, 42 L ed. 30 2, 17 S. Ct. 927.

The title to the cause of action here sued on was only such title as plaintiff acquired by and through an agreement illegal because champertous, the claim and cause of action having been assigned to the plaintiff (as attorney) to prosecute, pay the expenses of the prosecution, and return to the assignor a certain per cent of the gains. This court held that such plaintiff could only proceed through the illegal agreement in establishing his cause of action, and dismissed his case on the ground that he had no tate

Thompson v. Thompson (1802), 7 Ves. 468.

"Then how are you to get at it except through this agreement? There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises

Here you cannot stir a step but through the illegal agreement."

Hilton v Woods (1867), L. R. 4 Eq. 432.

"It is clear that the bargain between the plain of and Mr. Wright" (solicitor) "amounted to maintenance and if the latter had been the plaintiff, suing by virtue of a title under that contract, it would have been my duty to dismiss the bill."

Scott v. Brown (1892) 2 Q. B. 724.

Clark v. Hagar (1894), 22 Can, Sup. Ct. 510.

"A contract for transfer of property with intent by the transferor, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced."
(House and lot transferred for licentiousness).

Power v. Phelan (1884), 4 Dorion (Quebec) 57.

"A contract founded on an unlawful consideration has no effect, and the consideration is unlawful when it is prohibited by law or is contrary to good morals or public order."

Little v. Hawkins (1872), 19 Grant Ch. (U. C.) 267 (Ontario). Colville v. Small, 22 Ont. L. Rep. 426, 19 Ann. Cas. 515, citing

the Continental Wall Paper Co. case allove.

"An assignment of a money daim which authorises the assignee to sue for the amount, and out of the proceeds to pay costs and diside the balance between the assignor and assignee, is champertons and void." Assignee gets no title.

Johnson v. Van Wyck, 4 App. Cases (D. C.) 294. Progerson v. Imlay, 4 Blatchf. 503, 10 Fed. Cas. No. 5795. Pinney v. First Nat, Bank, 68 Kan. 223, 75 P. 119, 1 Ann. Cas. 331.

Wehmhoff v Rutherford, 98 Ky. 91, 32 S. W. 288. Gilroy v. Badger, 27 Misc. 640, 58 N. Y. Sup. 392.

Gescheidt v. Quirk, 66 How. Pr. 272.

Roberts v. Yancey, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep.

Miles v. Mutual Reserve Fund Live Ass'n. 108 Wis 421, 84 N. W. 159.

Mean v. Dugner (N. E.) 100 N. W. 800. v. Sahart (N. E.) 124 N. W. 79. v. Miller, 66, Fed. 637, (affirmed in 70 Fed. 128, 16 C. C.

A plaintiff cannot maintain an action for damages to infringement of letters patent, but his action must be dimined. When he acquired the title to his cause of actioned else in through a contract against public policy became have persons.

Cya. 881, 882, 485.

Ewart v. Walch, & Ohio St. 483.

Action brought by amignee of real cause of actio
The amignment itself did not clearly show that it w
champertons, but the court said: "If the parties to so
a contract, by a more change in its form, the introductio
of a few words; by agreeing that the claimant shall amighis claim to the champertor; that the latter shall prorute the suit in his own name, and pay to his assignor have of the recovery, can uscape the power of the count and force the tribunal which condemns champerty to aid the champertor the common law was indes when it pronounced champertous contracts void lourts are not so felpless that they can be rendere

owerless by the easy change of words in the contract, the shifting of parts in a play of champerty. Such trumals when not shackled by statute, look through the corus and form to mistance; deal with things, rather a small look at what was INTENDED, more than gaily admissible, establishes the actual fact. It is plantable the contract before us was skilfully drawn; that the urpose was to commit champerty in such FORM that is pull be impossible for any person, or court, to defeat it is the contract plaintiff sould not resever.

re in line with the rule that no title to quired cases the set of such acquisition in crim-by statute, or whole the transfer is made as a n, c. parsuant to, as as prohibited by statute of

Rice, 142 U. R. 28, 35 L. ed. 925, 19 map. Ct. 180.

"It rangles that both the transfer and guaranty couch notes to Hooker & Co., were void under the second no this to them or to their analyses." y of the The second

Central Transportation Co. v Pullman's Our Co., 139 U. S. M.

11 Sup Ot 478.

\*\* Ammon, 145 U. S. 421, 12 Sup Ct 894.

\*\* 987, 988, and cases cited.

\*\* 987, 988, and cases cited.

The amignment of transfer of a negotiable security

of the note given upon a valid with the new dates.

I two reary upon it by an animal of the part of the new dates. of carries also S Reco

Drinkall v Movius State Bank, H N, Dak., 10, 88 N. W.

724, 57 L. R. A. 841, 35 Am St Rep 690.

"Under the statutes of this state gambling is expressly prohibited. It is accordingly held, that the indorsement and delivery of a sushier's check by the payee to a cambler in payment for chips to be used in a gambling name does not make such gambler a holder in dus course, and the title so acquired is defective."

"The rule that courts of law and equity will lake the parties to prohibited transactions where their unlawful acts have placed thom, so far as the same are executed, does not authorize an indorse, who has procured the indorsement of a negotiable instrument in a gambling framsaction, to rely upon the indorsement so procured, other against the indorser or the maker of the instrument which has been so indorsed from enforcing payment against the maker, for the obvious reason that the contract which the latter enforces is not tainted with the unlawful transaction." ion."

14 Am & Eng Encyc of Law (2ed.) 647, 648, and cases. Thomas v First Nat. Bank. 218 Ill. 261.
Burke v Bunk, 31 Nev. 74; 89 Pac., 1078; 21 Ann. Cas 695.
Indeed, it was not intended by the Feb. 24, 1898, contract, e should be any actual passing of the title to the Victor pate at the Fargo Company to the Oreamery Package Co. This or was directly before the Minnesota Supreme court, at this years and it was an half.

was directly before the street, and it was so held.

State of Minnesota v Creamery Package Manufacturing
Co. (supra.) 110 Minn. 415, 437, 166 N. W. 126, 623, 115
Minn. 182 N. W. 286, 175e source saying in the
110 Minn. as follows.

"3. It is argued that when the February agreement, providing from the transfer to the appellant of the properties of the other concerns was carried out, a purchase of these properties was completed, which was lawful in itself. The contract, it is claimed, was fully executed and thereafter the appellant, as the absolute owner of all the preperty, might lawfully continue its business; further, that the use of the names of the other concerns and the fletitious competition between appellant's agents did not change the fact that, instead of a combination between two or more persons, the appellant was in truth only conducting its own business in the way of its choosing. If these deductions were sound, we would have for determination how far one may go is good faith and for a lawful purpose in taking over by actual purchase the

business of each competitor whom he encounters."

To our mind no such question is before us. The son for authorizing the creation of corporations and eir legal status when formed are familiar to all. characteristic quality of a corporation, which is essential to the utility of the association, is that for the transaction of its legitimate business it be a legalentity, having its own life and individuality distinct from its members; but when the corporate form is assumed by individuals for the purpose of evading the law, and as a mere cloak under which unlawful practices may be concealed, the courts will disregard the appearance and consider the substance, and thus determine the propriety of the transaction under scrutiny. (Citing authorities.)

The February agreement contemplated no absolute purchase and sale of the various properties. Upon the contrary, the plan was to place all the properties in the possession of the appellant, to be managed jointly for the benefit of the original owners, each of whose interest was to be evidenced by shares of the capital stock of app ant issued to each in proportion to his original holding If in place of the corporation an individual had been selected, who, when the legal title was vested in him issued certificates of trust, the violation of law would is apparent. This agreement went further. It provided for directors, representing those who made transfers of proerty, and for a minimum division of profits, thus continuing the control of each interest, instead of leaving such control with the majority of the stock, where it is ordinarily found; and, notwithstanding the provision for dis solution of the corporations so transferring their respe ive properties, the right to use the name of each for the surpose of simulating competition was attempted to conferred upon the appellant. The record does not disclose the terms upon which the properties of the concern not parties to the agreement were subsequently taken over, but, without ragard to those transactions, it must be held that the learned trial judge was entirely correct in describing the transfer made pursuant to the February agreement as a nominal purcha

In the above case, the Minnesots court termed the transfer to the monopoly "a nominal purchase." In the Standard Oil case the United States Supreme Court termed the title acquired by that company "its apparent title." In the American Tobacco case, the United States Supreme Court referred to such title as "apparest

We wish to call the particular attention of the court to the fact that the Minnesota Supreme Court, in reviewing this February, 1898 contract, sailed it unlawful at common law. The court uses the for

lowing language: "We believe the February agreement to have been un-

lawful under the common law" (110 Minn. at p. 432, 126 N. W., at p. 129,) and "The Standard Oil and Tobacco Cases are appealed to also to induce us to apply the 'rule of reason' to this case. In other words, we are asked to hold that our statute should be construed as forbidding only such a monopoly or restraint of trade as was illegal at common law. These decisions do not help defendant. It is expressly stated by Justice O'Brien in his opinion on the former appeal that 'we believe the February agreement to have been unlawful under the common law, though the decision does hold, on the authority v. Trans-Missouri Freight Ass'n, 166 U. S. 290. Ct. 540, 41 L. Ed. 1007, that the character of the c tion to which the agreement put an end is not make The evidence showed that the acts of defendant of The evidence moved that tuted an 'undue' restraint of trade, a monopoly and restraint of trade that would have been illegal at com law." (115 Minn., near end of opinion; 132 N. W. 270.)

The placing of the Victor patents under the control of the Creamery Package Co., by the February, 1898, contract, and the giving of control over the Howe, Ames & LaBare patent (sued or in the infringement suit brought against these plaintiffs in the name of the Owatonns Manufacturing Co.,) to the Creamer, of the "45-55" contract, was the creating of a trust for an uniawall purpose, with the Creamery Package Co., the illegal trustee.
The Creamery Package Co., in bringing its suit, and aiding the Owatonna Manufacturing Co., in prosecuting its suit, and the Owatonna Manufacturing Co., in prosecuting its suit, and in rendering assistthe Owatonna Manufacturing Co.,) to the Creamery Packag anufacturing Co., in permitting the same, and in rendering a see in the same, was using the United States court to enforce and effect such trust. Without the active assistance of a willing court, trust and unlawful object must have failed; with such assistan was perfected. A court will not lend its aid to the nt of an unlawful object.

(See authorities eited on p. 53 of attached brief, and

the following cases:)

Peck v Heurick (supra), 167 U. S. 624, 42 L. ed. 302, 17 Sup Ct. 927.

Graham v LaCrosse &c. Co. 102 U. S. 148, 26 L. ed. 106. Central Transportation Co.. v Pullman's Car Co., 139 U. S. 24, 11 Sup Ct 478. Hoffman v Bullock, 34 Fed. 248.

Forker v Brown, 30 N. Y. Sup. 827.

Gruber v Baker, 20 Nev. 472, 9 L. R. A. 308,

The object and purpose of a trust must be legal. 28 Am and Eng Eneye of Law (2nd ed,) 866, 867, and cases cited.

An association formed for an unlawful purpose cannot sue.

30 Cye. 29.

A corporation cannot be formed for an unlawful pur-DOSC.

10 Cyc 161 and notes.

That certain patents were included in the property sequired by the Oreamery Package Co., did not change the result.

(Cases sited at p. 52 of attached brief, and following cases:) Central Transportation Co. vs Pullman's Car Co. (supra,) 139 U. S. 24, 11 Sup Ct. 478.

(Sale of patents and much other stuff.)

"There is strong ground, also, for holding that the contract between the parties is void, because in unrear onable restraint of trade, and therefore contrary to public policy". "A covenant by the assignor of letters patent for an invention, that he will not himself make, use or sell the patented article, is undoubtedly valid, because the act of Congress which creates a monopoly expressly an thorises it to be assigned as a whole. Rev. Stat. See 4884, 4898;" \* \* \* "But this plaintiff's transfer and covenants, as we have seen, covered much more than patent rights, and are to continue in force long after the pat ent rights assigned must have expired."

Pope Mfg. Co. v Gormully, 144 U. S. 238, 12 Sup Ct 632. It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protect-

ed in his monopoly."

State of Minnesota vs Creamery Package Mfg. Co. (supra), In speaking of this very transaction the Minnesota court

said:

"There can be no question that the holder of a duly saued patent has a lawful monopoly in its use, and he iolates no public policy in protecting his monopoly to the follest extent. But it does not follow from this that the paterice acquires the right by combining with omer patentees to extand the monopoly granted to each, and thus abuse the privilege conferrd upon him by the government However this may be, we have no doubt that the combination under consi evation is within the probibition of the statute. It includes the manufacture and sale of many articles not protected by patents, and the fact that the patented articles constituted the principle ones dealt in by appellant, and that without a merger as to them no monopoly in the other articles would have been attempted, cannot be accepted as a justification of the combination."

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### TRIAL COURT DECISION.

At the end of the trial of this case, the trial judge, said as fol-

1. "I shall have to sustain the objection, and to hold, as a matter of law, that the damages alleged in the complaint, as I understand the complaint, are not such damages as are contemplated by the Act, and there can be no recovery for them in this action." (567-c) (The above objection was to the offer of plaintiffs to prove that dame ages.)

2. "After this illegal contract was made, and I will assume in connection with that that the contract was in violation of the Act and resulted in damages to the tiffs, are those damages such damages as are referre in this act, and for which the plaintiff can recover! If not, it is about as much as saying that the complaint does not state a cause of action." (539-a)

"Mr. Leach: The court holds that there is not evidence enough to go to the jury upon the questi to whether the two suits were brought as a part of the scheme to secure a monopoly.

The Court: If these damages are damages which are within the contemplation of the act, it would be another question." (552-c.)
4. "The Court: I think there is sufficient evidence

from which the jury might find that these two suits were brought by virtue of an agreement between the two panies; but I do not think it is evidence to show that was anything more than an agreement to bring the two suits together." (552-b.)

"The Court: No, I think there is sufficient evidence to warrant the jury in finding that there was an agreement to bring these cases together; but I think there is no evidence from which the jury would be justified in finding that the bringing of these two suits was done for the pur-pose of driving the plaintiffs out of business." (561-a.)

6. "In other words, must the damages which a private person can recover be the damages which flow from that feature of the contract which is in restraint of trade, or can he recover such damages which a person may suf-fer outside of that." (589-a)

7. "To my mind the damages contemplated by this Act are the damages which result naturally from the making of the unlawful contract, as in the case of the Pittsburgh Glass Company, where there was a special agreement in the contract itself to raise the price of glass to all prsons who were not inside the combination. So in the case in San Francisco, where there was an agreement to sell certain fixtures at an enhanced price to persons outside the combination. The natural effect of this would be to damage persons outside of the combination, and to

Opinion. "The law abburn unberfuges. It has an ide the covering and looks to the actual facts beneath."

The actions to justify the finding of a complimer, if it is action that the presence charges with suggesting personal by first note the mane object, when by the game one part of the cut and the other mane part of the cut and the other matter part of the cut and the other matter part of the state of the complete it, with a start to the complete it, with a start to the other part of the other

On reacting the above in a litogether too narrow construction on the trial court place in altogether too narrow construction on the unti-treat set. We contend that the record in this case region with facts aboving that the object and purpose of defendances to put these plaintiffs cut of business. The trial court was alting at the different acts menutely, with a microscope, reflect in the untiling at a reasonable distance and taking a comprehently we of the whole citaution. We contend that where the comfined its of several amount in maintaining a monopoly of intensity rade, in violation of the statute, naturally resulted in the driving those plaintiffs cut of business, make acts in themselves, findering those plaintiffs cut of business, make acts in themselves, findering those acts may not be preceded and controlled by a specific content atting forth, in terms, such object of driving observed business. The trial court held that we must have such acts in and of themselves insufficient. We contend to the sonary. Indeed, these acts catablished and prove, if not a specific meaning and a sampling to that offset. Most comprised are used by circumstantial evidence. People do not get together it and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing, specifying the object and reduce their comprised to writing apecifying the object and reduce their comprised to writing apecifying the object and reduce their comprised to writing apecifying the object.

From the imprane of the trial court above quoted, it appears to the trial court conceded (at No. "2" above, effect the Pelevary, agreement "resulted in damages to the "plaintiff.," and (at "4" above,) that the two infringement suits "were brought by the of an agreement between the two companies," and (at No. above,) that the two suits were brought by these defendants as part of the estimate is meutre a monopoly." If that February it, agreement resulted in damages to those plaintiffs (whether it amount were within the contemplation of the parties at the medicing made such contract or not,) or if the prosocution of the males with contemplation and threats) was done pursuit to the minural acheems, or as a step (over set) in the crimital committee, we allow that we are entitled to the damages in them, under the manimous decision of this court in the case [Leone v Lawler (208 U. S. 274, 52 L. ed. 486, 28 Sup Ct Rep 301, Am Cm. 615.) discussed and referred to at length in the attend brief. We also submit that the trial court regarded too this false authonomic, alanders and threats circulated by de-

tendant. When a false statement is knowingly and maliciously made or a rade as a step in, and pursuant to, such a conspiracy, and damage results to these plaintiffs, there is no ground whatever for experime. The same as more rumous or warnings. Even if it were not true that the two suits were presented, and the false statements and threath circulated, for the express purpose of striving these plaintiffs would be entitled to damages, for the reason that in actions to recover damages for tort, the damages recoverable is lude all damages resulting directly from the wrongful acts, whether forecen, contemplated or specifically agreed men before hand or not. 13 Cyc 28, and note, eiting cases by this court. The such a mages must have been specifically agreed upon before hand in our or to make the conspirators liable, is certainly new law, as would be an efficient proposition for a court to advance to shield convorations from the consequences of their wrongful acts.

#### CIRCUIT COURT OF APPEALS DECISION.

In this decision also, the court examined minutely the different f defendants, separately and apart from each other, as if the composition between them, and apparently did not in an a consider the question as to whether those acts were not a some carried out by defendants to secure a ch that point was strennously urged upon the C argument, as shown by the attached brief (Swill tates, 196 U. S. 395; 49 L. ed. 523; 25 Sup Ct 378) v United States, 196 U. S. 395; 49 L. ed. 523; 25 Sup Ct 27 me to un that the C. C. A. court entirely ignored the decisi ours in the Swift case, and other similar cases, urged up art at the argument. It was also strennously urged to the sat the title of the Creamery Package Co. to the patents it a, was void and that company had no right or title to any id no right to bring suit upon any such or to circulate the she statements and threats against these plaintiffs of patents. But we are unable to see, in the opinion of the C. C. rt. where that court paid any attention to this contention. C. A. court based its decision in this case upon its own case it well \* Continental Tobacco Company (125 Fed. 454, 60 C. C. 64 L. R. A. 688). This Whitwell case, decided in 1903, in Bighth Circuit, wes, in effect and substances, overruled by the missous decision of this court in the case of W. W. Montague at al. Lowry et al. (198 U. S. 38, 48 L. ed. 608, 24 Sup. Ct 307.) ecided in 1994; and on the argument of the case at bar in the C A. court, the attention of the court was specifically called to the stagns v Lowry case, but the C. C. A. court apparently follow and decision as authority to the exclusion of the of this court in the Montague v Lowry case. The C. C. A. od controlling stress upon the fact that certain litigation were the two defendant corporations at the time they alleged illegal agreements. If that is the rule to be followed acceptantions can start a few lawsuits on patents, and abire all the patents in the world and place them under

entrol. We believe the only patent infringement suits ever brought are brought by the Owatonna Manufacturing Company on its bove mentioned a second patent, and that no such suit was ever cought against any machine made under the Victor patents, and hat no final decree was ever entered in any suit again combined churns and butter makers on the market in 1998. This patent of the Owatoum Manufacturing Come and "void, for lack of invention, in view of the prior are that decree in the suit brought by that company again sal decree in the suit brought by that company agrilled these laintiffs (p. 123-a.) And we offered to prove on the trial of this see that the Owatouna Manufacturing Company surregulately stained this patent and knew it was void when it brought that sit (p. 551-c. 552-a.) The idea on the part of defendants was to do y combination what no manufacturer was able to do by viewe of a patent or patents, and to bring enough lawsuits to crush a constitute by force, even if the patent sued on in the one was sufficient and there was lack of title to the patents in the other has fee trial court conceded, at No. "11" above, that there was this ack of title. ack of title.

## LAINTIFFS HAVE A CAUSE OF ACTION AT COMMON LAW.

The Creamery Package Co. not having any title to the po sued upon, the title of those patents being in the Fargo Com had no right or authority to prosecute its suit. It is the san there a person brings a suit in the name of another without minority for so doing. The Creamery Package Co. mus harged with knowledge of the kind of a title it had.

38 Cyc. 517:

"It is an actionable wrong to being suit to another name without authority, whereby injury is sustain Neither malice nor want of probable cause are essent elements of the cause of action."

Bond v Chapin, 8 Mete. (Mass.) 31, M. "But in an action on the case for damages for prosecu-ting a suit against the plaintiff without authority, in the name of a third person, the gist of the action is not a want of prebable cause; for there may be a good cause of action; but for the improper liberty of using the name of another person in prosecuting a suit, by which the de-fendant in the action is injured. Nor is the proof of malice essential to the maintenance of such action. If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and seted upon that supposition, without malice, still if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain

Moulton v Lores, 22 No. 488

natur v Daw, 20 Ma. 442.

Smith v. Hyudman, 10 Cont. (Mann.) 554.

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An index to the complaint in this action appears to the or this brief.)

on the inside of the Sherman Anti-Trest Act a on the inside of the front cover.

#### STATEMENT OF PACTS

arties, nature of action, plaintiffs' interstate businesses was destroyed by defendants wrongfully and loint approximating two infringement suits against plaintiffs, and by the defendants circulating the standers and libels that plaintiffs' churn was an infringement. The monopoly of defendants. The trial court said that the two infringement suits were prosecuted by the defendants acting together, by their coalition.

rial court held also that there was sufficient evidence to show that the defendants, acting jointly, prosecuted aidd two suits as a part of their schools to maintain a monopoly.

intiffs hever infringed any patent of defendants. Decisions in 2 patent mits.

Detailed statement of standers, libels, threats and intimidation made by defendants among plaintiffs

hort statement of plaintiffs' damages...

ie monopoly of defendance, how secured and maintained, including names of companies absorbed and controlled by defendance, and including names of churus made, by said defendant companies.

times and Dishrive Mfg. Co. (including the closing one of the Dishrive Mfg. Co.) Castala provisions

but race of Peb 24, 1998, including some of the provintions of said contract, and names of persons and conparations covered by the same. Pletitions names used by defendant Creamery Pkg. http://oww. https://doi.org/10.1008/j.htm.doi.org/10.1009/j.htm.doi.org/10

namet of June 4, 1898, between two defendants corporations. Some of the terms of same: How defendants divided among themselves the business of making churus.

mesopoly of decendrate more in detail, by those

Country Pr. Mfg. Co. controlled to same.  (hand of D.H.; Burrell & Company of Little Falls,  New York)	
Lagrania ther corporations and denceras bought out by O amory Pkg. Mig. Co. orbequent to Feb. 24,	
Plettings or "stalled" bids made by Creamery Pkg. Mfg.	
Transity Pky. Mfg. Co. began ruleing prices immediate tupon their yetting control of the industry, Feb.	
A 1608  At 1608  Mig. Co. had no part in this increase in price for manufacturing the churas from	
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## STATEMENT.

The plaintiffs in error (plaintiffs in the circuit court) brought this action under section 7 of the Sherman Anti-Trust Act, to recover damages sustained by them to their interstate trade and commerce. The court below directed the jury to return a verdict in favor of the defendents for the reason that 'as a matter of law, the damages alleged in the complaint. \* \* are not such damages as are contemplated by the Act' (two thirds of the way down from the top of page 567 of the record). The plaintiffs asked a new trial which was denied.

The plaintiffs were engaged in the business of manufacturing combined churns and butter workers (certain features of which were covered by letters patent) at Owatonna, Minnesota, and from there shipping the same to and selling them at various other places in several of the other states of the United States as well as Minnesota. (Combined churns and butter workers used in Creameries). (The churns made by plaintiffs were called "The Owatonna Churn")

The Owatonna Fanning Mill Company is a corporation of Owatonna Minnesota.

D. E. Virtue was the President of said corporation.

D. E. Virtue and the Owatonna Fanning Mill Company were jointly engaged in the said business, each furnishing a portion of the capital and property used therein,—a joint adventure or undertaking.

The business of the two defendant corporations was the manufacture and sale of combined churns and butter workers (under certain letters patent) in the same territory, and also the sald Creamery Package Manufacturing Company was engaged in manufacturing and selling, throughout the United States, all kinds of dairy and creamery supplies (some of which were protected by letters patent and some of which were not), as well as installing in creameries complete creamery outfits.

(A description of the mechanism and manner of working a combined churn and butter worker is given beginning at the middle of page 296 of the record).

The plaintiffs in error had their business, and the property they used in connection therewith, injured and their interstate trade and commerce destroyed; (1) By the prosecution by the two defendant corporations against these plaintiffs of two separate patent infringement suits, one brought by each said corporation against these plaintiffs in error, and (2) By the defendants circusting, amongst the agents, users, purchasers, and prospective purchasers (located in different states) of the churns of plaintiffs,

The Contrary Declary Manufacturing Company is a corpora

The Citation Cont. In these was the President of spil Control Manufacturing Company, and took on selling part in Michael Cont. Spirite State.

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"Be Court: Dr. I think there is no bired only dense to recent the jury in facility that there was no success to him; then twen topolor,"

o community thing and crowners supplies of all kinds, and also is the business of installing complete creamery outflet.

The that the bringing of such two suits, and the circulation of such reports, by the defendants was not an isolated, single set, and as not a complimely involving only such conduct; but all so he under two a part such portion of a much more comprehensive that and scheme on the part of defendants,—one to secure a moscophy in the United States in the business of manufacturing and elling combined churus and butter workers and dairy and creamy applies of all kinds and in the business of installing complete connersy outfits. It is more accurate to say that the bringing of and two suits, and the circulation of such reports, was an attempt at the part of defendants to maintain and continue the monopoly in that line which they had acquired during the years previous of which they then had, and this attempt was successful in that the destroyed the plaintiffs' said business.

In 1904, and for some time prior thanks the

In 1904, and for some time prior thereto, the two defendant exporations had been enjoying a very nearly complete monopoly a many of said states, including Minnesota. Wisconsin, lowe, limit Dakota and South Dakota, in their said line of business, they proposed to continue and maintain such monopoly at the time plaintiffs began in 1904 their said business, but the plaintiffs accorded in acquiring quite a start in interstate trade and communic when the two defendant corporations began their two suits and began their threats of infringement suits against the users of limitiffs' churses and their circulating of said statements and their threats of infringement suits against the users of limitiffs' churses and their circulating of said statements and their circulating of said statements and their circulating of said statements and the forestants covering combined churns and butter workers.

defendants covering combined churns and butter workers.

Plaintiffs allege in the complaint and contend that the two deselves compositions combined and conspired together to prosecute aid two saits, and prosecuted the same by concerted action, for the same reason that "men can often do by the combination of many what, severally, no one could accomplish, and even what, when two by une, would be innocent." There is a potency in uniform when combined which the law cannot overlook, where ajucy is the consequence." (Quoted in Northern Securities Co., II S. 191, II S. 197, 48 L. ed. 679, 24 Sup. Crt. Req. 68, from larging Run Coul Co. v Burclay Coul Co., 68 Pa. 178, 186), and also that they circulated the said rumors, statements and threats larger to the consequence.

The position of the trial court seems to us to be that all the paterial allegations of the complaint had been established on the interest of evidence excluded by the court (meaning by this of course that there was sufficient evidence to go to

the jury and from which the jury could find all such allegations to be true), but directed the verdict against plaintiffs on the ground that the particular items of damages sought to be recovered by abstricts were not such as are contemplated by the Sherman Anti-Trust Act. (The damages sustained by the plaintiffs were itemhed in the complaint.)

This position of the court is shown by the following extracts

from the record: The first on pages 516 and 517-

'Q. When did you begin to have an interstate trade, if at all, in the manufacture and sale of combined churns and butter workers?

Mr. Cohen. That is objected to because it is too indefinite, as to wheth arit means with reference to the Owatonna Fanning Mill Company or not. This is a joint action. I judge from the last question that this calls for an answer to the question whether he has a list of machines made by himself and the Owatonna Fanning Mill Company, but the question is too indefinite.

The Court. What is the object of the question?

Mr. Lesch. To show the extent of the business of the plaintiff, as preliminary, and to show that they were driven out of business by the commencement of this suit, and by circulation of these rumors.

The Court. I have serious doubt about the question as to whether the damages alleged in the complaint are such damages as are contemplated by the Act. I would like to have that question discussed and argued and decided before we go into this question of damages, because if after argument I should be of the opinion that the damages caused by the bringing of these two suits are not such damages as are contemplated by the Act, that would practically and the case, I suppose."

she on page 552 near the bottom of the page-

"Mr. Leach. The Court holds that there is not evidence enough to go to the jury upon the question as to whether the two suits were brought as a part of the scheme to secure a monopoly.

The Court. If these damages are damages which

The Court. If these damages are damages which are within the contemplation of the Act, it would be smather question."

Therefore, the court below did not direct the verdict in this

that the two suits were breaght, and so ports circulated and threats made, as a part of the common scheme, or as a scheme and and conspiracy in itself. The case is not here to raview any decision of the lower court on this point. The case stands here as a ruling of the court below in effect and substance that there was sufficient evidence to show that these two suits were brought pursuant to as secoment and compiracy to bring them, and that they were prosocuted as a part of the general scheme on the part of defendants of securing a monopoly.

On the trial of this action, and just prior to the direction of the verdict, the plaintiffs offered to prove that they never, in manufacturing and selling their churns, infringed any patent claimed by or belonging to either of the two defendant corporations. (These offers of proof are on page 568 of the record.) The Court refused to admit this evidence, no doubt on the theory that, if the plaintiffs were not entitled to recover such items of damages, then it was immaterial whether they were infringers or not infringers, although the Court does not give the reason for such ruling.

Therefore, the plaintiffs in error were not infringers, and never infringed any patent owned or claimed by either one of the

defendant corporations.

In fact the patent suit brought by the Owatonna Manufacturing Company against these plaintiffs (begun July 16, 1904) terminated in a final decree entered (January 26 1907) in favor of these plaintiffs in error and against said Owatonna Manufacturing Company. In the patent suit brought by the Creamery Package Manufacturing Company against these plaintiffs in error, after the evidence was taken, and the case submitted to the court, an interocutory decree was entered (January 26 1907) that these plaintiffs were infringers and providing for restraining order and appointing a referee to ascertain and report the damages and extent of the infringement. But no further proceedings were had after such interlocutory decree; no accounting was ever had, nor was any testimony ever taken by said referee; no final degree was ever entered in said suit; and the same is still pending without a final decree, but with said interlocutory restraining order in force and effect. It was argued to the court on the trial below that this interlocutory order would have no force or effect as an adjueation on the merits of the infringement question in this action at law; and we take the same position here. That was one of the reasons why the plaintiffs below were ready to and did offer to try out the question of infringement in this action, which the court refused to permit. Our theory is not that the defendants had any ight to form the combinations and conspiracies which they did in

fact enter into and by reason of which they districted the baness and property of plaintiffs, even if plaintiffs, were lafting either in a slight and instruitionant or greater degree. but, if the plaintiffs in error in this action were in fact infringers, it would be a bearing upon the amount they would be extitted to recover this action, depending in part on the extrat and character of the infringement.

The plaintiffs in error proved on the trial of this action the defendants, where the plaintiffs in error had continue agents, circulated reports that the characteristics and sold by the plaintiffs in error were an infringement uses the "Dishow I alongs" owned by the defendant Owatesea Manufacturing County and that the defendants threatened the consumers of plaintiffs, with mits far infringeness and with actions for damages if such contours a parchase the churce manufactured by plaintiffs, and that by reason of the circulation of such reports the consumers of plaintiffs were away and their leminess damaged, and in some places ontice destroyed.

The fact and effect of the circulation of such reports is chosen by the following, to wit: By the testimony of Mr. Ladd, at the hottom of page 452 and on 653, showing that Mr. Ladd, an assect of plaintiffs at Saginawi, Michigan, saw betters which were written by the attorneys of the two complainants is not easily with (defendant corporations herein) to the effect that the classes following look by the plaintiffs were an infragramma of the patents of call Greamery Package, Manufacturing Company. This witness Ladd Greamery that the church made by plaintiffs on account of the the agent or to sell the church made by plaintiffs on account of the the record. Directly after the writing of these letters, and about that time, it is shown by the testimony of this witness at the two of 457 of the record, that purchaners stated to this witness at the task of the record wish to buy the Owntonna church on account of the patent may, in the state of Michigan, was destroyed. The witness Manufacturing at the hottom of page 468 of the record state; that he was the agent for the male of the church of plaintiffs in Seath Dalois. Northwestern flows. Southwestern Minerals and North Dalois, Northwestern flows. Southwestern Minerals and North Dalois, and on page 460 he states where he cald classes for place the factors of page 460 was admitted to be an agent of the Crumony Package Manufacturing Company.) threated the creamery of Own Dalois, with infringement units if they hought the classes.

parts by planting (page 472, Q40). And this same where it is not provided at the former of page 472 and is page 474 that is not page 47

The relevant Barbara tentified in about the middle of page 814 that he was it work for the Motival Commony Supply Company and the was it work for the Motival Commony Supply Company and the was conficulting from an its road sublified formers and batter workers and manager and dainy supplies in Middle, Indiana, Indiana, Ithiana, Wissenbar, Elizabeth and Ivery and this returned tentified (XQ10), on page 514) that this Motival Commony Supply Company was haveing a good broke in the Occasional Chara (the chara most and all for phinotella and the company was haveing a good broke in the Occasional Chara (the chara most and all for phinotella and to tentified at the latens of page 517 and on page 518 that they were thereafter and the make sales of the mid Common character in account of the latens of page 517 and on page 518 that they were thereafter and the make sales of the mid Common character in account of the latent company the broken in the mid infringement must said for the mid to the mid infringement must said for the mid to the mid infringement must said for the mid to the mid infringement must said for the mid to the mid infringement must said for the mid to the mid infringement must said for the mid to the mid infringement (action of the map 527, Q80 and 52).

The bringing of said two colored by the checking of said two colored by the checking of the said two colored by the checking of the said two colored by the checking of the ch

mmerce.

We have stated that the defendant corporations were engaged the business of securing and maintaining a general monopoly. The defendant Creamery Package Manufacturing Company, at the time of the bringing of said two suits, was interested in the monopoly in all the articles of merchandise and enterprises here-inbefore mentioned. The Owatonna Manufacturing Company was interested in only that part of same pertaining to the manufacture and sale of combined churns and butter workers, and the extras d repair parts for same, this company being manufacturers and sellers of churns and repairs for same and not of other dairy or creamery supplies. But such monopoly so acquired by said Creamery Package Manufacturing Company was one entire mopopoly, the monopoly in all said articles and enterprises acquired by the same acts, the Owatonna Manufacturing Company coming in, where they nicely fitted in, with their chu-na and butter workers alone; for they had no other articles in that line. Of course, the plaintiffs were likewise only affected by this monopoly, and the attempts of defendants to secure and maintain it, in so far as it concerned combined churns and butter workers. The plaintiffs and the Owatonna Manufacturing Company were similarly situated in this respect. But the whole transactions of the Creamery Package Manufacturing Company, being indivisable, were necesrily shown, resulting in its said entire monopoly.

Those transactions were as follows:

In April 1897 (or shortly thereafter) the following named cor-

porations were doing business at the following named places, to wit:

1. The Creamery Package Manufacturing Company, a manufacturing and selling house, lucated in Chicago, Illinois, engaged in the business of selling all kinds of pairs and creamery supplies, including combined churns and butter workers manufactured by the Disbrow Manufacturing Company, mentioned in paragraph"3" part following.

2. The Owatonna Manufacturing Company, a corporation located at Owatonna, Minnesota, engaged in the business of manufacturing and selling combined churns and butter workers under latters patent. (The Distroy churn).

3. The Disbrow Manufacturing Company, a corporation located at Mankato, Minnesota, engaged in manufacturing and sell-ing (selling through the Creamery Package Manufacturing Com-pany) combined churns and butter workers under letters, patent (The Winner churn).

4. The Cornish, Curtis & Greene Manufacturing Company, loted at Fort Atkinson, Wisconsin, engaged in manufacturing and

selling creamer, and dairy supplies and also combined churns and

butter workers, under letters patent. (The Wigard Churn).

5. The F. B. Fargo & Company (of Lake Mills, Wisconsin), a corporation located at Lake Mills, Wisconsin, engaged in the business of manufacturing and selling various kinds of creamers and dairy supplies, and also combined churns and butter workers under letters patent. (The Victor churn).

6. A. H. Barber & Company, a corporation heated at Chicag Illinois, engaged in the business of manufacturing and selling various creamery and dairy supplies, and also combined churns and butter workers, under letters patent. (The Barber churn).

7. Cornish, Curtis & Greens Company, a corporation located at St. Paul, Minnesota, engaged in the business of selling creamery and dairy supplies, including combined churns and butter workers. This house was largely a selling agency for the Cornish, Curtis & Greene Manufacturing Company, and was not engaged in manufactoring. (Selling said Wicard churns).

8. F. B. Fargo & Company (of St. Paul, Minnesota), a corporation located at St. Paul, Minnesota, engaged in the business of selling various dairy and creamery supplies, including combined churns and butter workers. This house was largely a selling agency of the F. B. Fargo & Company of Lake Mills. Wisconsin. and was not engaged in manufacturing. (Selling said Victor churns).

9. C. E. Hill & Company, a co-partnership, composed of C. E. Hill and Fred McNish, located at Kansas City, Missouri, an-

gaged in seiling various creamery and dairy supplies.

Of the above nine concerns the Creamery Package Manufacturing Company was the largest, and had a number of branches where it manufactured the various goods sold by it through its house located at Chicago. One of its branch houses was located at Kames City, Missouri; one at Mason City, Iowa; one at Portand, Indiana; one at Coolwater, Ohio; one at Southwhitely. Indiana; one at Elgin, Illinois; and one at Lexington, Missouri,

tween all these nine separate concerns there was reen and active competition in interstate trade and commerce in the manufacturing and selling of crosmery and dairy supplies, and in the manufacturing and selling of combined churns and butter work-ers, under the various letters patent held by said different concorns, and this competition was "very intense" (page 303, fourth line from top of page). (This is true except that the Creamery Package Manufacturing Company was acting as the selling agent of the Disbrow Manufacturing Company, and the Pargo house in St. Paul was acting as an agent of the Fargo Company at Lake tills, and the Cornish, Cortis & Greene Company at St. Paul was

eting as a selling agent of the Cornish, Curtis & Greene Manufacturing Company of Ft. Atkinson, Wisconsin).
On April 19 1887 the first step was taken to bring about this

monopoly and restraint of trade, as follows:

The Dicbrow Manufacturing Company, number '3' above, entirely went out of business. It made a contract (April 19, 1897) with said Owntonns Manufacturing Company (page 89 of the record, Exhibit B 9) in and by which it agreed: 'and said first parties The Disbrow Manufacturing Company and its stockholders) idintly and severally convenant and agree not to engage in the burn and butter worker business, either manufacturing or selling "during the life of said patents or this contract" (page 91 of the record at middle of page). "Said patents" being the patents which had prior to that time been used by said Disbrow Manufacturing the patents. which had prior to that time been used by said Disbrow Manufacturing Company in the manufacture and sais of its combined churus and butter workers, and which letters patent were on said April 19 1897, and as a part of the same transaction, assigned to the Owatonna Manufacturing Company. Also on said April 19 1897 a contract was made between the Disbrow Manufacturing Company and its stockholders and the Creamery Package Manufacturing Company (page 99 of the record, Exhibit B 11) in nd by which they terminated their former contract under which he Creamery Package Manufacturing Company had theretofore the Creamer Package Manufacturing Company and thereunfore been selling the combined churns and butter workers manufactured by the Disbrow Manufacturing Company, and in and by which the Creamery Package Manufacturing Company agreed (at top of page 101) to pay to said Disbrow Manufacturing Company those revalues which by the last above mentioned contract, became due from the Owatonna Manufacturing Company to the Disbrow Manufacturing Company to the Disbrow Manufacturing Company on all combined churns and putter workers manufactured and sold by them during the life of sertain United States Letters Patent assigned to said Owatoms Germin United States Letters Patent assigned to said Owatomas Manufacturing Company by a certain other contract of even date herewith reference to which is also had and made" (this quotation is from said contract B.H. and begins at the top of page 100 of the record). Also on said same date there was executed from the Disbrow Manufacturing Company to the Owatomas Manufacturing Company an assignment of four separate and different patents covering combined churses and butter workers, and also one certain application for a patent upon combined churse and butter workers, and also one certain application for a patent upon combined churse and butter workers, which application had been allowed by the United States Patent Office (said assignment begins on page 97 of the record, Exhibit B.10). Also on said April 19 1897 a conteast was entered into by soft between the Greanery Package Manufacturing Company and

the Owstonna Manufacturing Company (beginning at the top of page 60 of the record, Exhibit B.1), in and by which the Greamery Puckage Manufacturing Company became the exclusionary of said Owatonna Manufacturing Company, said to "continue during the life of the patents on combinand butter workers now owned and controlled by the first part (Owatenne Manufacturing Company), and those while it may hereafter acquire." (Page 70 of the record, one this from top of page). Then follows in said contract the list of patents on said date acquired by the Owatonna Manufacturing. Com pany from the Disbrow Manufacturing Company. Also said on tract contains the list price of the churns to be thereafter m by the Owatonna Manufacturing Company, the Creamery Packa Manufacturing Company to pay to the Owatonna Manufacturi Company 50 per cent of such list prices for each churn sold by selections. Package Manufacturing Company. But there is nothing n said contract which fixes the price at which such churns should be sold by the Creamery Package Manufacturing Company. The selling price of those charms was to be and was exclusively under the control of the Creamery Package Manufacturing Company, This is true not only of this contract but also of the subsequent contracts made between the said two corporations). In and by this contract the Creamery Package Company acquired "the entire control of the sales throughout the United States and territories thereof, Canada and all foreign lands, for all sizes and kinds of Combined Churns and Butterworkers, and repairs for same, manufactured by the party of the first part (Owatonna Manufac-turing Company), its licensees, successors and assigns during the entinuance of this contract," (third paragraph on page 69). Said natract further provided that the Creamery Package Manafacturing Company should deduct out of the price to be pets by it to the Owatonna Manufacturing Company for each charn a certain stated royalty to be paid by the Greamery Package Manufacturing Company to the Dishrow Manufacturing Company. The skid con-tract also contains the following provision (page 71):

The party of the first part further agrees to protect the party of the second part from all suits for infringement of patents: or china for decayou arising out of the tales of said charms and not the final of the party of the second part, also to defend at its dwn expense the validity of the passens, presently and visurously attack infringers of any said all of said paissents concerning Combined Command become about and to procure patients on all improvementsmade by it

or may person in its behalf." erefore, in resume of this paregraph we say, that on April 1897, by virtue of the three contracts and the assignment of patent mentioned in this paragraph, the competition which infore existed between the Disbrow Manufacturing Company be Greanery Package Manufacturing Company as sales agent, one hand, and the Gwatonna Manufacturing Company, on her hand, was entirely eliminated (all said companies prior her hand, was entirely eliminated (all said companies prior hand, and companies), and the at date having an interstate trade and commerce), and the abrow Manufacturing Company entirely discontinued its business, d the Creamery Package Manufacturing Company obtained conof the whole output of the Owatonna concern, with full powto name its own price for the churns sold, the Disbrow Manucouring Company and its stockholders agreeing that they would

dever spain go into the business of selling or manufacturing shurns or butterworkers during the life of certain patents or during the life of their said contract.

Thereafter, on February 24, 1888, the Creamery Package Manufacturing Company by virtue of the contract (Exhibit A. attached to the complaint), secured control of, or bought, all the property of all the remaining eight of the above mentioned concerns (excepting the Owatonna Manufacturing Company) including letters patent, pacufacturing plant, goods in stock, good will and other assets (except that said Creamery Package Manufacturing Company only purchased the creamery supplies and refrigerating business and secounts and other property appertaining thereto of said A. H. Barber & Company, the said A. H. Barber & Company being then ber & Company, the said A. H. Barber & Company being then sayed in business as commission merchants in Chicago, in addition to their said business in creamery and dairy supplies). The courses Package Manufacturing Company increased its capital ock from \$400,000 to \$2,000,000 (page 48 of record, tentil-line from nd issued its shares to the various concerns it so bought as payment for said property, the value thereof to be demissed by committees. Said contract contains the following vision (page 50 of record:)

FOURTEENTH, It is further agreed that, upon the receipt by the individual members of said firms and by the stockholders of said corporations, of the parties of the second part, of the shares of the capital stock of said Gressnery Package Manufacturing Company, as herein provided for, said individual members of said firms shall dissolve their respective corporatership and settle and adjust all partnership matters, if any, that are not covered by this agreement, and said stockholders of said corporations, other than those of said A. H. Barber & Company, shall immediately take such steps as are required by law to dissolve and shall dissolve their respective corporation, and shall furnish to the directors of said Creamery Package Manufacturing Company a certified copy of their dissolution; it being the intent and purpose of this agreement that each and every one of said corporations other than said A. H. Barber & Company, shall be dissolved and cease to exist as a corporation, and the individual stockholders of said corporation hereby, guarantee the fulfillment of this agreement by their respective corporations."

And also said contract contains the following provision (page 5 of record):

"TWENTY-THIRD: It is further mutually agreed by and between all the parties hereto that as to any application now pending for any patent made by any one of the parties to this contract or any machinery or other articles or appliances pertaining to the business carried on by said Creamery Package Manufacturing Company, the patent, if any, when issued shall be assigned to said Creamery Package Manufacturing Company, said corporation to pay all expenses of taking out and transferring said patent or patents."

Although the Creamery Package Manufacturing Company obtained control of all said concerns, and required them to discontinue business, the said Creamery Package Manufacturing Company did not change the names under which it continued to carry on the busas at the various manufacturing plants of said various concerns; it ill continued the use of the name of F. B. Fargo & Company at Lake Mills, Wisconsin; it still continued to use the name of Cornish, Curtis & Greens Manufacturing Company at Pt. Atkinson, Wisconsin it still continued the use of the name F. B. Fargo & Company St. Paul, Minnesota; it changed the name of A. H. Barber & Company to A. H. Barber Manufacturing Company: the old A. H. Harber & Company still remaining in business and continuing to nduct its business as commission merchants. The Creamery ckage Manufacturing Company soon discontinued the house of C. E. Hill & Company at Kansas City, and soon discontinued the dling house of Cornish, Curtis & Greene Company at St. Paul. ind up until the trial of the above entitled action (July 27 to August 1, 1909) the Creamery Package Manufacturing Company still continued to conduct and carry on its business at Ft. Atkinson, Wisconsin, under the name of the Cornish, Curtis & Greene Manufacturing Company, and conducted its business at Lake Mills, Wisconsin, under the name of the Pargo Creamery Supply House, and conducted its business at St. Patt. Minnessota, under the name of Fargo Creamery Supply House (a change having been made at these two places from "F. B. Fargo & Company," to "Fargo Greamery Supply House" sometime shout 1964), (It is the claim of plaintiffs that the Creamery Package Manufacturing Company used these different names instead of its own to mislead and to make a show of competition). Therefore, we say in resume of this paragraph, that by the acts referred to in this paragraph the Greamery Package Manufacturing Company absorbed the business and property of all said other concerns, and in that way there was destroyed all the competition which had theretofore existed in interstate trade and commerce between said Creamery Package Manufacturing Company and said other six concerns, and also in this way did the Creamery Package Manufacturing Company destroy the competition which theretofore existed between said concerns in the manufacture, under letters patent, of combined churns and butter workers.

Thereafter, and on June 4, 1898 (three months and one week after the deal of said February 24, 1898), the defendants Creamery Package Manufacturing Company and Owstonna Manufacturing Company, made a new contract (Exhibit B 4) (beginning on page 77 of the record), in which contract it is recited (page 77) that said Greamery Package Manufacturing Company 'has acquired the business of said F. B. Fargo & Company of manufacturing and selling churns and butter workers' (especially the Victor churn), and in which contract it is agreed (third paragraph on usee 80 of the record) that the defendant Owatesase Manufacturing Company shall manufacture and furnish 55 per cent of all shares, and that said Creamery Package Manufacturing Company still manufacture and furnish 45 per cent of the churat, to be said. The Greamery Package Manufacturing Company still continues to act as the sale selling agent of the Owatesas Manufacturing Company. The Owatesase Manufacturing Company still he softing to any about the price at which any of these churativity the Owatesas Company, see the "Victor Churas" to be manufactured by the Greamery Package Manufacturing Company. It is thus seen that although the Creamery Package Manufacturing Company. It is thus seen that although the Creamery Package Manufacturing Company.

pany and continued to represent to the public generally that said F. B. Pargo & Company was the same old concern, entirely independent of the Greenery Package Manufacturing Company was entirely togrisant of the true situation,—in other words was in on the deal, and in for a purpose). How nicely this contract of June & 1898 between the two defendant corporations fitted into the scheme of said two corporations to get a monopoly in the United States can only be seen when all the doings, as hereinbefore resisted are looked at as a whole from beginning to end. The Owatona Manufacturing Company was the first to go into the deal with the Gressnery Package Manufacturing Company (when on April 19, 187) said two defendant corporations put the Disbrow Manufacturing Compony of Mankato, Minnesota, out of business); the next step was the acquiring by the Creamery Package Manufacturing Company of the business of the various competitors of said Owatona Manufacturing Company (by the contract of February 24, 1896), all with the full knowledge on the part of the Owatonna Manufacturing Company, and the next step was this agreement, contract of June 4 1898, in and by which the two defendant corporations agreed between themselves as to what part of the chura business each abould have. That they secured by these transactions from 90 per cent to 100 per cent of the business in many of the states of the United States in the manufacture and sale of combined churns and butter workers will be now shown.

That the two defendant corporations secured a monopoly in the business of manufacturing and selling combined churns and butter workers in several states of the United States is conclusively established by the following undisputed testimony (this testimony also shows that the Creamery Package Manufacturing Company in many of the states acquired a monopoly of the business of selling creamery and dairy supplies and of installing complete creamery outfits): The witness Frink states, at the bottom of page 293, that the Creamery Package Manufacturing Company and fully 85 percent to 90 percent of the trade in Minnesots, Wisconsin, North Dakota and South Dakota in the business of furnishing "specialties" to creameries in those states directly subsequent to the making of said contract of February 24 1896; and this same witness states at the top of page 294, that this same company had in this territory about the same percent, during the same period, in the business of putting in complete creamery outfits and he states, at the the top of page 294, that the same company also had at that time practically all of the business in the

and the calculated following these contracts of April 18, 1807 and any 18, 1807, the two defendant experations had actually size and very experiment from 50 per cent to 180 percent at all actions of conscious series and selling combined characteristics and actions and appear Michigan. In April 18 Debug, to them lower and appear Michigan. In April 18 per test of the business. And that the mild contracts and agreements and attention Creatment has Manch testing Company and at least 85 per cent of the season of the fact Ming conscious creaming outlitts in these states, at the audit has a mind composition had about 180 per cent of the least and last amount composition had about 180 per cent of a least season of company and delay

or defendant corporations in selling their said Dis-credums slid not have 160 per cent of all the busi-sing charms and butter workers was due to the fact certain other charms on the market. The only or which had any trade of any consequence (aside man charm made by plaintiffs subsequent to about and the Perfection charm made by the Perfection equent to about January, 1908), was the Simplex by the D. H. Burrell & Company of Little Fulls, a, which charm is scentimes called the "Burrell we find that the Creamery Package Manufacturing se 'Simplex Churus." Mr.

ill this to thinks it was in this fall of 1001 that he saw the

centrales.

Subsequent to main Pubricary 24, 1888, the date of one of the calls contracted hereinbefore mentioned, the Greenery Parking femulacturelax Company bought out the following 8 places of maintenning company and each of which is the time it was a complete out of the Greenery Package Manual Complete out was a complete out was a complete out of the Greenery Package Manual Complete out was a complete out which is the Greenery Package Manual Complete out was a complete out which is the Greenery Package Manual Complete out was a complete out which is the Greenery Package Manual Complete out was a complete out which is the complete out whic

A. J. Cushman Company, doing business at Waterloo, lows. The Creamery Package Manufacturing Company bought this and the said Gushman Company went out of business for all time (page 350, top of page; 358, one third from top of page).

2. Cook & Reid Company, doing business at Des Moines.

2 Cook & Reid Company, doing business at The Mostes over (top of page 271).

2. Stockhard Manufacturing Company, doing business at Rupland, Vermont, (bottom page 271).

3. A portion of the business of Storgis, Cornish & Burn, tested at Chicago, Illinol... (top of page 272).

5. A portion of the business of Storgis, Cornish & Burn, tested at St. Paul, Minnesota. (top of page 272).

6. A portion of the business of Storgis, Cornish & Burn, tested at Kanaca City, Missouri. (top of page 272).

7. The Franch Butter Tub Company, doing business at Rock Island, Illinoly. (middle of page 271).

8. E. W. War. Company, doing business at St. Paul, Minnesota.

have conted that the comment process. Manufest temps used said different names of the concerns fought one being and make a show of competition. In fact they Package Manufecturing Commany sent out its different man from its said different brokehes tunder said different man from its said different brokehes tunder said different man from its said different brokehes tunder said different man from its said different brokehes tunder said different man from its said different brokehes tunder said to volve and the said of th conservations when they bid on the patting in of a chicar a man when they bid on the patting in of a chicar a man of supplies, where competitive tide were accompany there be addition non-tinde, instruction agrees. Package Hamiltotting Company, per and aged their bids, the rule being that one about the 1-per ham the lowest, and the next one 1-per cent still higher than the lowest. And they should all tetain their old name at 1890, that they should all tetain their old name and table a till a conservation. (Both accompany to the contract and the second of the stain their old name and table a till a contract apparent competition. (Both accompany) are set; page 821.

The state of the his contract of Fouriery 24, 1920, camery Package Manufacturing Company connectical to 32 prices on all articles and that the case in prices on combination and bitther worsers, should that that consider reamery Package Manufacturing Company discontinuing the account of 25 per cent on list price which the company had formely abowed on said articles (top of page 328). This was an interest increase over their former price of 38; per cent. An his name witness (estimate that thereafter there was a continued steady increase in the price of all goods handled by the reamery Package Manufacturing Company. This is fully at the bestimony on pages 223 and 329. This same without on page 850 that for several years before February 24, 1896, there was no change in the prices. Mr. Frink, who was in the employ of the Creamery Reckage Manufacturing Company directly subacquent to February 24, 1898, restined (middle of page 299) that this rise in prices was from 10 per cent to 55 per cont.

Although this raise in prices, was made to the continuous prices.

Although this raise in prices was made by the Green Package Manufacturing Company on all churss, yet the manufacturers of the Disbrow churse (the defendant Owatonna Manufacturing Company) did not get any part of this increase in part of the company is the company in part of this increase in part of the company in part of the company in part of this increase in part of the company in part of this increase in part of the company in part of this increase in part of the company in part of this increase in part of the company in part of this increase in part of the company in part of the com menufacturing the churns and making them ready famous Package Manufacturing Company to sell. This in price, therefore, went into the pockets of the page Mampfacturing Company. And was not do ented incommend to the Creamer, accessed familie secured and Turnished A. Creather, Professes Manufacturper under the contract of April 19, 1897, and 21 the test in said contract of April 19, 1897, (Exhibit B. J., heating in said contract of April 19, 1897, (Exhibit B. J., heating in said contract of April 19, 1897, (Exhibit B. J., heating in the record) as between the two determinant corporations on page 88 of the record) and in and by which continuously 1, 1908, there was an increase in the prior received overtours. Manufacturing Company for manufacturing there exists a magging from 10.72 per cent to 16.66 per this is above by comparing the order list of the up of particular factors in prior of 33 1.3 per cent in its second of this factors in prior of 33 1.3 per cent in the second.

in the cost of manufacturing the Diabreus characters would have been probably any such increased out in the manufacturing the Victor church. Also this 124 per cost of increased action was pure profit which the Cromovy Pacies. However, because had nearly a complite memorally of the characters and hadar mediately.

The mid without Holomo also tectibles (bottom of man and top of page 330) how the different travelles and it is Greatery Package Manufacturing Country was out by that carries named clandentimely most and industrial hours forest names, clandentimely most and secretly arranged to put their fictitious bids. for the purpose of making assessment tition.

emplete crownery outlit con nines used in a complete pla gine, piping, and time and belting and connected with the menu or up the machine to running order to d from the witness Frink at top of I School industry in the United Section 2 The second second and the second second second second second 1898. P. Carlotte and at the month of Lat 1 making of mid contract of Paherany M. 1988, by the may could eliminate con g houses which did not s er and would give to the C facturing Company, a memorally of the least plote treamery outfits (pages 286 and 287). And also the district that is the my the G decuring Company could get him ery supplies (Pages 202 See 205 p

As to what they would be after they had they come to be a second t

The state of the Print of the Printers of the Country Pretage and April 19, 1987, by the first of the Country Pretage and April 19, 1987, by the first of the Country was called the first of the Country Pretage and the first of the first

These volumes weakful that when Gates (Freezing of the Country) was it becomes a few parts of the Country) was it becomes a few parts of the Country) was it becomes a few parts of the Country) was it becomes a few parts of the Country of the Coun

ness L. A. Disbrow, last one third of page 445) as follows:

The witness Ames testified (middle of page 559) that Gates (President of Creamery Package Manufacturing Company) came to the office of the Owatoma Manufacturing Company in Owatoma before going to Mankato at that time, and stated that he thought that if they would go over to Manufacturing Company whereby they could "eliminate the competition that at that time axiated between the Owatoma Manufacturing Company and the Disbrow Manufacturing Company." Of course at this time, the Creamery Package Manufacturing Company was the selling agent of the Disbrow Manufacturing Company, and not of the Owatoma Manufacturing Company, and there were then no contract relations, so far as the record shows, between the Creamery tract relations, so far as the record shows, between the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company, but they were competitors.

And the following testimony was given by the witness L. A. Disbrow as to what took place at Mankato at that time in the negotiations leading up to the making of the contract of April 19 1897 (last 1 of page 445):

"Q. In answer to Mr. Cohen's question you stated that Mr. Gates spoke about stopping the competition which exists between the Disbrow and the Viewer and your churn by that agreement; did Mr. Gates say anything of that kind, about preventing any competition in the future between these

"A. Yes, he said that it would stop compe-tition, that that was all the churns in the market that amounted to anything, and therefore he would

that amounted to anything, and therefore he would get all the trade. It would eliminate competition practically; that is the words he used."

The witness Rueben B. Disbrow testified that at this same meeting in Mankato the president of the Creamery Package Manufacturing Company, Mr. Gates, told him, the witness, that they had already had an arrangement agreed on (middle of page 409). This Victor churn was the one that was then being made by the F. B. Fargo Company, at Lake Mills, which company was rot openly a party to the negotiations at Mankato, nor a party openly to any of the contracts there made on April 19 1897.

We have now at length gone into the transactions in and by which the defendants obtained and continued their monoply in the business of manufacturing and selling combined charae and butter workers. Perhaps we have gone into unnecessary detail.

maxmuch as the court directed the verdict on the ground that the demages sustained by plaintiffs were not such damages as in law are contemplated by the Sherman Anti-Prust Act.

Wherefore, from what we have already stated and shown, its

Wherefore, from what we have already stated and shown; It appears that it was the purpose of the two defendant corporations is doing what they did and correlling the different patents, and in putting some patents on the shelf, throughout all the years from 1897 to the present time to get and maintain their said monopoly. It was and would at all times have been impossible for the two defendant corporations to collect together a lot of patents and secure and maintain a monopoly without bringing infringement suits to drive any new-corner, if they could not otherwise get rid of him, out of business. And when we find two corporations conspiring together to get and maintain this monopoly as these two defendant corporations did, we can not be surprised to also find them conspiring together to presente law suits against an elleged infringer nor would we be surprised to find them prosecuting suits whether with or without merit. In fact in the several alleged illegal contracts hereinbefore mentionfact in the several alleged illegal contracts hereinbefore mentionof we find provisions for the bringing of law suits, showing conclusively that that was one of the means in the minds of the two defendant corporations at the time they made their alleged illegal agreements. Law suits were form an essential part of the change and were to be used wherear accountry.

We find these provisions concerning infringement suits in the following contracts:

In said contract of April 19 1897, between the two defendant corporations made at the time the Disbrow Manufacturing Comturing Company agrees to "promptly and vigorously attack infringers of any and all of said patents, concerning combined churse and butterworkers and to procure patents on all improve-ments made by it or by any person in its behalf! (two thirds of

the way down from the top of page 71).

And the said contract of June 4 1898, also between the two
defendant corporations (which is the one plaintiffs contend was

de on account of the making of said contract of February 2A.

16) we find the following provision (at bottom of page 80):

"Said party of the first part (Owntomm Manufacturing Company) hereby agrees to protect all patents upon combined churns and butterworkers that it now owns or those that it may hereafter acquire, by prosecuting infringers thereof at its own expense; and said party of the second part (Greamery

Package Manufacturing Company) hereby agreed that it will give to end party of the first part any possible assistance in the prosecution of such intringers, provided, all exposes thereof shall be borne by said party of the first part. 

Also in the contract of April 19, 1897, hereven the Disbrow Manufacturing Company and its stockholders (known in said contact as the parties of the first part) and the Owatoma Manufacturing Company (known in said contract as the party of the second part) we find the fullnessing provision (middle of page 94):

"IX. The party of the second part shall have and is given the right to presecute in its own name all infringements of any patent or patents heretofors or hereafter acquired by it from said parties of the first part or either of them, whether said infringements have occurred or may hereafter occur. That all expenses of such prosecution shall be borns by said party of the second part, and all recoveries shall be for its exclusive use and benefit, and said party of the first part shall have no interest therein or an amount thereof.

X. In any such litigation said parties of the

first part agree jointly and severally to give to said party of the second part, but without expense to themselves, any information or assistance that they can, and should it prove necessary, said party of the second part is authorized to make said first parties co-plaintiffs with itself in the prosecution of infringers of any patents acquired by said party of the second part from the parties of the first part, or any of

During the trial of this action, the plaintiffs offered to show that in the year 1900 the defendant Creamery Package Manufacturing Company and another corporation leased from he plaintiff D. E. Company and another corporation leased from he plaintiff D. E. Virtue and one Martin Deeg a certain potent on combined churns and butterworkers for the period of three years, said Virtue and Deeg being the inventors and owners of said patent, and the said Gresnery Package Manufacturing Company and the other corporation agreeing to manufacture churns under said patent and place them on the market and sell them during said period of three years at a certain revalty for each churn; that said patentees entered into said contract of leasing to good faith, but that the defendant the Greanery Package Manufacturing Company and the other corporation mayor intended to perform or fulfill the terms of said contract of leasing, but made the saine only for the purpose of getting control of said patent, and of all churns which could be manufactured under said patent, for the purpose of keeping the same off the market. (These churns of said two patentees were called "Globe Churns," but this desig-nation or name does not anywhere appear in the record in this case. The name of the churn is immaterial, but we will call aid churns by that name in this brief). The court sustained the objection of defendants to this on the ground that all of this was immaterial in this case. We rely on this as an error in this case. This contract of leasing begins at the middle of page 101 of the record. The question asked concerning this contract to which the objection of the defendants was sustained, and the discussion fully showing what we offered and expected to prove, begins at the bottom of page 242 of the record. We contend that by this method the said Globe charn was kept off from the market. The other lessee in this contract, in addition to defendant Creamery Package Manufacturing Company, was the Curnish, Curtis & Greene Manufacturing Company of Ft. Atkinson, Wisconsin. There was at the date this contract of leasing was entered into, of course, no such company as this in existence. This was simply a name used by the Creamery Package Manufacturing Company to deceive the public and in this instance the plaintiff Virtue. The allegations in our com-plaint concerning this contract of leasing and the bad faith of the Creamery Package Manufacturing Company in reference to the same, are set forth in par. 24 on page 11 of the record.

Another claim of the plaintiffs is that the Creamery Pack-

Another claim of the plaintiffs is that the Creamery Package Manufacturing Company never had any title whatever to any of the letters patent mentioned in the bill of complaint in the said suit for infringement brought in its name against these plaintiffs. We distinctly allege in the complaint (par. 32 on page 18, and par. 55 on page 37) that the contracts, assignments of patents and all agreements under and by which the Creamery Package Manufacturing Company attempted to secure title to said letters patent were at all times void and of no force or effect, being contrary to the terms of the Sherman Anti-Trust Act, and that the Creamery Package Manufacturing Company, therefore, never acquired any right, title or interest in or to any of said letters patent. And we proved conclusively and without controversy (pages 488 to 490 of the record) that the only right or title the Creamery Package Manufacturing Company ever had to any of said patents was such as it acquired by and through as-

and conditions of soid contract of Postunity St. 1966 and its caper one its forms. The contract of Postunity St. 1966 and its caper one its forms. The contract of the patents from the vale of the caper of the total caper of the patents from the vale of the caper of the total cap

the district of the state the time of bottom of page 480 and the district of the state the top of page 480).

We embod that the Country Package Manufacturing Constant over even any of add letters putent on which its said intrinsection that was prosecuted against these plaintiffs; and date districts the prosecute any said on such patents, as the their defendants at all those well know. We allege in our complaint and claim that out and every act mentioned in the complaint are claim that out and every act mentioned in the complaint of complainted of including the presecution of add two saits, says date pursuant to the common scheine and complaint of complaints to secure a monopoly and in a strain of trade. It is true that in the infringement will trought by the defendants to secure a monopoly and in a strain of trade. It is true that in the infringement will trought by the defendant (from or Package manufacturing temperary against these plainting an interior name decree was undered distinger. It let the plaintiffs in the section did not necessary against these plainting an interior name of the section of the parameters of the section of the parameters and the parameters are parameters and the parameters are parameters and the parameters and the parameters and the parameters and the parameters are parameters.

reful combination and frust axintalized by the detectional after the testimony was all taken in said infringenessiate and the same had been submitted to the rount for design (Par ta, beginning on page 51 of the recurs).

That the two infringement write prosecuted against the plaintiffs (begin July 16, 1904) were jointly presecuted by an agreement of the defendants to that end (as held by the trial part at the top of page 561), and were presecuted as a part of the alleged illegal scheme of manapoly on the part of designants (as the court intimated, if not directly held, at the attom of page 552), is particularly evidenced by the following a facts and circumstances brought out on the trial some or which facts and circumstances have already been referred to:

4. Said two infringement suits were started at the sai

They were prosecuted by the same attorneys. They were prosecuted together from beginning to end and argued and submitted to the court together at the close and frequently during the taking of the testimony the officers of the two corporations were consulting together at the various places where the testimony was being taken (page 644).

1. The officers of the defendant Greamery Package Manu-

taring Company were in attendance at the taking of the to many which alone affected the defendant Owntonna Manuta

ring Company (544).

5. The exhibits used by the two complements in said separate suits were all stored in Minnapolis in the warehouse of

rate suits were all stored in Minneapolis in the warehouse of a Creamery Package Manufacturing Company, and were it burgs of Mr. Cooper, the manager and agent of the Creamer selage Manufacturing Company at that place (bottom of the 548; page 524 and first eight lines of page 525).

6. Directly after the readering of the final decree in fave (defendants (plaintiffs herein) in the suit brought by the stoams Maracturing Company, and the entering of the sactioentory decree in favor of the defendant Creamery Package Manufacturing Company in the suit brought by it against a plaintiffs, the defendant Creamery Package Manufacturing Company of all costs to be tamble and creamery Package Manufacturing Company and patient of mid Creamery Package Manufacturing Company and patient the plaintiffs beceived, was for the purpose of depoint at the plaintiffs in this action from getting day money out a sea the plaintiffs in this action from getting day money out in

the defendant Owntown Memorinaring Company in the in at coats in the unit brought by that company against the plaintine. This assignment of coats is set (both degineral a the battom of mage 147 of the record, and the plaintin Vertucations on the frint below in it this assignment of coats a the bittom of page 500.

ter there intringement onth were barred a tess pinincials, the was considerable talk and negotiations of west the attaches for the complainants (Mr. Paul) and the distance for the complainants (Mr. Williamson) as a whether those two suits had any merit, and Mr. Williamson pilleted ingether a number of patents and showed them to er. Paul, and thus negotiations come to a point where Mr. Paul, in Manacapolis, was unable to give to Mr. Williamson an inswer as to whether or not the prosecution of said two suits rould be continued. Thereupon, Mr. Williamson demanded a definite answer from Mr. Paul as to whether these prosecutions would be continued. And thereupon Mr. Paul stated to Mr. Williamson that he (Mr. Paul) would have to go to Chicago to curult, with the Creamery Package Manufacturing Company ofuse he could decide, and Mr. Paul soon thereafter sent to by Williamson (October 17, 1904) a letter as follows: "I coing to Chicago Wednesday night to consult with my Chicago in reference to the churn suits. I will wire you a Chicago Thursday afternoon." Thereafter, Mr. William n received from Mr. Paul the following telegram, dated at nicego the 20th: 'Will proceed with both suits.' This letand telegram appears at the bottom of page 573 and at the
p of page 573 of the record. The circumstances hereinbefore
cited leading up to the sending and receiving of said letter of telegram are set forth by Mr. Williamson on page 542 and a first half of page 545 of the record.

8. Evidence was introduced during the trial showing that the defendant La Bare, the president of the defendant Owaton at Manufacturing Company, was chasing around to get evidence for the defendant Creamers Package Manufacturing Company to be used in the sait of said company, or was around after a least one witness for the defendants in said two saits (plainties in error herein) to get said witness to go "where Mr. Paul, he lawer for the Creamers Package Manufacturing Company only meet him and talk with him before Mr. Virtue saw him middle of page 435). This tends to show that the defendant Bare was out on hebrit of the Creamery Package Manuface

arring Company. This testimony the trial court struct out (we the type of page 406) as not emonating to anything, but we claim that the court erred in striking out this testimony, and we also

that the court errot in striking out the testimaty, and ere all age and street his to one of the errors to this court.

If the various contracts under and be suffice at which the defendants put many of their competitors out of bishness and secured their putents, expressly provide for the prosecution of infringement suits. The presecution of at least the said suit of the transactional Manufacturing Company against these paintiffs was directly pursuant to the terms of said contract, and an be read right into the same. We have hereinbefore quoted hore previations of said contract, and those provisions of such contracts in (u)). This suit was without any merit.

10. The bring ng and prosecution of said two infringement mits fits right with all the other acts of the defendants in securng and maintaining their said monopoly like the different parts I a building prepared at different places and by different hands

then amembled

11. The two defendant corporations were jointly interestof in maintaining the said monopoly in churas and butterworkers. They had in fact an agreement between themselves as to how many charms each should manufacture for the market; one to manufacture 56 per cent of all churns and the other to manufacture 45 per cent, of all charms (the 3rd per, on page 80). And they arranged it so there would be no competition between

THE ACTUAL AND NECESSARY RESULT OF THE BRINGING AND PROSECUTING OF SAID TWO SULTS (in the way and manner they were brought and procuted) WAS TO DRIVE THE PLAINTIESS HURELS OUT OF BUSINESS AND DESTROY THEIR INTERSTATE BADE AND COMMERCE AND TO PURTHER SECURE ND CINCH TO THE DEFENDANTS THEIR SAID MO OPOLY. BY THE PROSECUTION OF SAID TWO SUITS HE DEFENDANTS SECURED AND RETAINED THEIR AID MONOPOLY. WITHOUT THE PROSECUTION OF HORE SUITS THEY WOULD BAVE LOST THEIR MO-

In addition to the above, we call special attention of the court to the fact that, after the plaintiffs had started and setime prior in the bringing of said two patent suits, an agent a mid Greauery Package Manufacturing Company came to Own

- 1. The Winner Chara (by purchase, April 19 1897).
- 2: The Winest Chrise (by purchase, Pelerony 24 1998).
- 2. The Burber Chain (by purchase, Pelerany 21 1898).
- The Gable Claims (by brooking many James or 2004, and an associationing trades the large).
- 6. The Marghet Chara (White thems the Commery Parkage Ministration of Company (Ed. and put of the carried, but by contact arrival the carbodie right of bounding the same to make a facility).

Actualist Owntowns Magnifecturing Compa-m were competitors of the Creaming Package mpany, are as follows:

mulacturing Company, of Mankato, Minne-

(April 1897).

2. Ournish Curtis & Greene Manufacturing Company, of Athiesta, Wisconsin (Rebrunry 21 1898). 2. Cornish, Ourtis & Greene Company, of St. Paul, Minne-

ta (February 24 1838).

L. F.B. Fargo & Company, of Lake Milis, Wisconsin (Feb.

K. P. D. Fargo & Company, of St. Paul, Minnesota (Febart 24 1898).

6. A. H. Barber & Company (in part), of Chicago, Illinois

CHART 24 1898). 7. C. E. Hill & Company, a partnership, of Kansas City, ouri (February 24 1898).

8. A. J. Cushman & Company, of Waterloo, Iowa.

S. Cook & Held, of Dee Moines, lows.

10. Stoddard Manufacturing Company, of Rutland, Ver-

Sturgis, Cornish & Burn, of Chicago, Illinois. 

Storgie, Cornish & Burn, of St. Paul, Minnesota,

Brurgh, Cornish & Burn, of Kansas City, Missouri.

The Presmont Butter Tub Company of Rock Island. 

The E. W. Word Company of St. Paul, Minnesota:

16. D. E. Virtue and the Owntonna Fanning Mill Compana. Minnesota.

t before the Creamery Package Manufacturing Comection against anid Cushman Company of claims Cushman Company was intringing its patents. 100 of the record. Possibly this is one reason why the my sold out).

is what gave to the defendants their mid monopoly er cent. to 100 per cent. of the bankous of d 85 p churus and butterworkers and of installing ey outlits and of solling creamery and dairy supplies. And by the doing of these things the business and property of the plaintiffs was seriously bjure's, such pairs of it as were not totally destroyed, to the damage of these plaintiffs in the sums and amounts stated in the complaint. In considering this case it is well to bear in mind the fol-

lowing the date.

April 19: 1897, the date of the contracts of Markato. Minnesota, between the two defendant corporations and the Disbrow Manufacturing Company.

2. Pencency 24 1898, the date of the contract by which the defendant Oreamery Package Manufacturing Company acquired the business and proporties of several other concerns, including the Victor patents.

3. June 4 1898, the contract made between the two defendant corporations dividing up the trade between the two defendant corporations, and made on account of seid contract

of February 24 1898.

4. July 16 1904, the date on which the two infringement suits were begun, one by each of the two defendant corpora-

tions - near these plaintiffs.
5. January 26 1907, the date of the final decree in favor of these plaintiffs in the suit brought against them by said Owatonna Manufacturing Company; and the date of the interlocatory decree in favor of the said Creamery Package Manufacturing Company in the suit brought by it against these plaintiffe

The final decree in the suit prosecuted by defendants in the name of the Owatonna Manufacturing Company against these plaintiffs is that there was no merit in that suit, and that the letters patent of to all parts relied upon in that suit were rold (pages 123-124). That decree is binding on all the defendants in this action; for that suit was prosecuted by all the defendants acting together, to the knowledge of the plaintiffs herein. THEREFORE, IN THIS ACTION THAT SUIT SPANDS AS HAVING ABSOLUTED Y NO LEREL

The Creemery Package Manufacturing Company never had any title, we contend, to the letters patent on which the suft brought in its name was prosecuted, THEREFORE, THAT SUIT WAS WRONGFULLY AND UNLAWFULLY PROSE STATED WE CONTEND, FROM THE BEGINNING, TO THE ENOWLEDGE OF ALL THE DEFENDANTS.

The from: of expense to these plaintiffs, caused by the processor of said, suits are SEPARATELY states in the comple ist

Paragraph 25 (on page 14 of the record) states in detail the tems and expense counsed by the prosecution of the Owntowns throughturing Company case, and paragraph 31 (on page 17) dates those caused by the Greamery Package Manufacturing Company suit. Those damages we offered to prove on the trial,

thich the court refused to allow. But we allege in the complaint that the damages wought to recovered in this action were caused to those plaintiffs by a COMBINED PROSECUTION OF SAID. TWO SUITS BY THEIR PROSECUTION THROUGH THE CONCERT ED ACTION OF THE DEFENDANTS, as well as by the unawful threats and the slanders and libels circulated and made r defendants as to the churns of plaintiffs.

In closing this statement of facts, we again call the attenm of this court to the five remarks of the trial court at the flore of the testimony, when the evidence was practically all in, aitting whatever the trial court might have said at earlier tages of the trial):

1. (Page 552).

"The Court. I think there is sufficient evidence from which the jury might find that these two suits (two patent infringement suits) were brought by virtue of an agreement between the two companies;"

2. (Page 553).

"Mr. Leach. The court holds that there is not evidence enough to go to the jury upon the question as to whether the two saits were brought as a part of the scheme to secure a monopoly.

The Court. If these damages are damages which are within the contemplation of the Act, it would be another question."

3. (Page 567).
The Court: "For these reasons I shall have to sustain the objection and to hold us a matter of law, that the damages alleged in the complaint as I understand the complaint, are not such damages as are contemplated by the Act, and there can be no recovery for them in this action."

(Page 568, fast line, and top of page 569).

Mr. Leach. With regard to those rumors and the other things which the Court mentioned, we think we have shown enough of these to entitle up to damages, it being in restraint of trade. We have connected these rumors with the defendants in such a way as they would be liable to us in this case for damages.

The Court. The rumons, as I understand it, were next out either by agents for the company or by the companion themselves, to the effect that persons who must that churn would be proceeded. I do not think that would be sufficient."

(It was the position of the trial court that, incomed as the defendants had brought their two patent infringement using they could circulate all the libels and slanders they wished as a plaintiffs' churns, and could make all the threats they wished against its users and prospective purchases, although all these were IN THEMSELVES directly in restraint of trade, asia from being done and performed by the CONCERTED ACTION as a part of the alleged illegal scheme and combination).

tract was made, and I will assume in connection with that that the contract was in violation of the Act and resulted in damages to the plaintiffs, are those damages such damages as are referred to in this Act, and for which the plaintiff can recover? If not, it is about as much as saying that the complaint does not state a cause of action;"

(What we specifically refer to here in the intimation of the court that the complaint does not state a cause of action, —"IF NOT, IT IS ABOUT AS MUCH AS SAYING THAT THE COMPLAINT DOES NOT STATE A CAUSE OF AC-TION;" As we understand, this is really the ground on which the court below directed the verdict in favor of the defendants):

Possibly we should earlier in this statement have called attention to the fact that, both at the time of the making of the contracts at Mankatu of April 19 1897 and at the time of the contract of Feb. 24, 1898, there was certain patent litigation pending between name of the different concerns which would into those contracts. And one of these suits had proceeded a fur that a preliminary injunction or restraining order (and only such restraining order,—buttom of page 218) had been issued in fuver of the defendant Oversane Manufacturing Company and against the P. B. Pargo Company, stopping the

better company manufacturing a certain chara, but this chara-against which this order was issued 18 NOT ONE OF THE CHURNS HISBEINBEPORE MENTIONED IN THIS STATEMENT; it was a clear assumbetured by F. R. Pargo Company in the carrier days, and was known as "Style A" clears. There was also a "Style B" clears manufactured by this F. R. Pargo Company. HOTH THOSE CHURNS WERE DONE AWAY WITH WHEN THAT RESTRAINING OR-DER WAS SERVED AND WHEN THE PARGO COMPA-NY BROUGHT THE VICTOR ONTO THE MARKET. THERE NEVER WAS ANY SUIT AGAINST THE VICTOR CHURN. Taking the whole record into consideration, it is a fair conclusion that, whatever anybody might have thought shout there ever having been any merit in any of those suits, WHEN THE VICTOR APPEARED ON THE MARKET (IN the control of the Fargo Company, which company had experienced litigation with the Owatowna Company over its former styles of churse) IT WAS AT ONCE DISCAVERED ON THE PART OF ALL THAT THE MARKET COULD NOT BE CONTROLLED OR CORNERED BY THE CRE OF THE PATENTS AND THAT RESORT WOULD HAVE TO BE HAD TO COMBINATION. It weems that the Victor churn come out and was put onto the market by the Parge Compa directly after the restraining order against that company on the "Style A" was served in the spring of 1896 or 1896, and in about two months thereafter the Fargo Company and the Victur on the market (but half of page 200). This Victor after-words developed into one of the strong churus on the market. It was in fact agreed in the contract of June 4 1896, between the two defendant corporations (page 77 of record,—Exhibit B-4, third puregraph from the bottom of page), that the Victor there was not an infragement of any one of the patents held or owned by the Ourstania Manufacturing Company.

#### ARGUMENT.

(Hetere proceeding with the different divisions of the aspassing of error, we will state a number of propositions which complete well established by the decisions).

#### Presention 1.

IT IS NOT NECESSARY TO PROVE THE COMMIS-ON OF ANY TOST, WRONGFUL ACT OR CRIME ON HE PART OF DEFENDANTS, ASIDE FROM WHAT IS COMMITTED BY THE TERMS OF THE SHERMAN ANTI-SUST ACT, IN ORDER TO MAKE THE DEFENDANTS LABLE IN DAMAGES TO THE PLAINTIFFS IN THIS CTION.

Loewe v Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301.

Montague v Lowey, 193 U. S. 28, 48 L. ed. 608, 24 Sup. Rep. 307.

Chattanooga F. & P. Works v Atlanta, 203 U. S. 390, 51 L. L. 261, 27 Sup. Ct. Rep. 65.

Jayne v Loder, (CCA) 149 F. 21.

Wheeler-Stenzel Co. v National Window Glass Johbers' Pa (CCA) 152 F. 864, 10 L. R. A. (N. S.) 972.

Penn. Sugar Refining Co. v Am. Sugar Refining Co. (OCA)

People's Tobacco Co. r American Tobacco Co., et al. (CCA) F. 396.

Monarch Tobacco Works v American Tobacco Co., et al.

Swift & Co. v U. S., 196 U. S. 395, 49 L. ed. 523, 25 Sup. Rep. 276.

# Proposition 2.

THE ACT OF COMBINING—THE CONCERTED AC-CON—ISUND WFUL IN ITSELF, AND IS THE BASIS OF A CAUSE OF ACTION FOR DAMAGES.

Loewe v Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 8 301.

Swift & Co. v U. S. 196 U. S. 395, 49 L. ed. 523, 25 Sup. Ct. 526.

Albers v Wisconsin, 195 U. S. 194, 43 L. ed. 154, 25 Sup.

Penn. Sugar R. Co. v Am. Sugar Co. (CCA) 166 F. 254. Juyne v Loder (CCA) 149 F. 21.

Ellis v Inman, Poulsen & Co. (CCA) 181 F. 182.

NOR IN IT NECESSARY THAT THE ACT WHICH HOULD BE ANYTHING IN TERES PROBIBITED IN THE SHERRAN ANTI-TRUST ACT. IT IS NOT NECES ANY THAT IT BE A STEP IN THE PORMATION OF TOWNSHIP TO THE PORMATION OF THE OR A SECT IN THE ATTEMPT TO SECUR to it supplies in such an ac IONOPOLY. RIGINATED IN OR WAS DIRECTLY ASSOCIATE THE MOTURE WHICH WERE THE CAUSE O CONTRACT, COMBINATION, CONSPIRACY O AND BURN ACCEPTION NOROPOLY.

attenuoge Poundry & Pipe Works v City of Atlasta 8 200, 51 L ed. 241, 27 Sup. Ct. Rep. 68.

200

In this case the court e fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful (Connolly w Union Sewer Pipe Co 184 U. S. 540, 46 L ed 679, 22 Sup. Ct. Rep. 481) in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong," celtion &

PERFORMANCE REPROPERTING FOR THE PROPERTY OF THE PROPERTY OF THE PERFORMANCE OF THE PERFO ROTOREDAND TRADE AND COUNTROL

Lawe Tlawlor 208 D. S. 274, 28 Sup. Ot. Rep. 301, 8

Montager ve Levery, 190 (1) (8) 38 (8) 7, ed. 408 (2) Sun

Shawnes Compress Co. v Anderson, 209 U. S. 428, 52 L. ed. 865, 28 Sup. St. Rep. 572.

thear Refining Co. v American Sugar Refining Co. (CC) 1 (6) TY 25 L

Proposition 5
EVERY ACREEMENT OR TRANSACTION WHOM RECT EFFECT IS TO DESTROY OR PREVENT COM-PETITION IS IN RESTRAINT OF TRADE.

Northern Sechrities Co. v. U. S. 198 U. S. 197, 48 L. a. 879, 24 Sup. Ct. Rep. 4

S. v American Pobecca Co., 164 F. 700.

awnee Compress Co. v Anderson 209 U. R. 423, 52 SOLVER STILL OF HER OF

U. S. 7 Traini, Mc. Preight Ase'n, 166 C. S. 200, 41 L. 100G, 17 Sup. Ct. Rep. 540.

U. S. v. Johnt Transc Amer. 170 B. R. 505, 19 L. ed. 208,

The Nation

Presidente de

A SCHEME OR CONTRACT WHEREBY A CORPORA-ION DISPOSES OF THE BUSINESS, AND AGRE VER THEREAFTER BEMAIN OUT OF BUSINE ADDITION OF THE PROPERTY OF THE PROPERTY LANGE RUST ACT.

Shawnes Compress Co. v Anderson, 209 U. S. 423, 52 L.

, 865, 28 Sup. Ct. Rep. 572.

Cases cited in note beginning on said page 865 of 52 L of. Proposition 7.

A COMBINATION HAS OBTAINED A MONOPOLY THEN IT HAS REACHED A POSITION WHERE IT CAN CONTROL PRICES AND SUPPRESS COMPENTS ON

U. S. v American Tobuces Co., 164 F. 700, on page 721, and namerous cases cited on page 721.

Proposition 8.

WHERE THE NECESSARY AND DIRECT BELEOT THE COMBINATION IS TO RESTRAIN TRADE OR PRECTUATE A MONOPOLY, THE INTENT IS IMMA Part All

Addresson Pipe & Steel Co v U. S. 175 D. H. 211, 44 L.

4 136, 20 Sup Ct. Rep. 96:

Proposition 9.

BUT WHERE ACTS IN THEMSELVES ARE NOT BEECT A IN BESTRAINS OF TRADE OR DO NOT DE DETERMINE ROWARDS A MONOPOLO OF VARIOUNIE N ATTEMPT, THE INTENT OF THE PARTIES BE-MER MATERIAL

Swift & Co. v U. S. 196 U. S. 395, 49 L. ed. 523, 25 Sup.

A Rap 276

Loewe v Lawlor, 208 U. S. 274, 52 L ed. 488, 28 Sup. A Rep. 301.

Penn Sugar Refining Co. v American Sugar Benning Co.

CCA 1 168 F. 254.

Bigelow v Calumet & Heela Mining Co. (CO) 167 F. 704, a cited on page 709.

Proposition 10.

THE CASES OF CONSPIRACY IT IS ALWAYS PER DESABLE TO ALLEGE AND PROVE THE HISTORY

AND VARIOUS STEPS CULMINATING IN THE FINAL CONSPIRACY, EVEN THOUGH THE PREVIOUS STEPS WERE SEPARATE AND DISTINCT OFFENSER, IF THEY TEND TO THROW LIGHT ON THE PRESENT CONSPIR. ACY AND TO SHOW THE INTENT WITH WHICH THE FINAL ACTS WERE COMMITTED.

Wharton on Criminal Ev., sec. 32

Greenleaf on Ev., sec. 111. 8 Cyc. pp. 677, 678, 684.

Swift & Co. v United States, 196 U. S. 205.

United States v Greene, 115 Fed. 344.

Lincoln v Classin, 7 Wall. 132

N. Y. Mut. Life Inc. Co. v Arasstrong, 117 U. S. 300.

Moline-Milburn Co. v Franklin, 37 Minn, 137, and can cited."

(The above is taken from page 46 of the law brief of the United States in case of the United States v Standard Oil Co., et al., in the C. C. of the United States for the Eastern Division of the Eastern Judicial District of Missouri.)

Also see many other cases and Text on pages 46-54 of mid

brief.

Proposition 11.

'A PERSON OR CORPORATION JOINING A CONSPIR-ACY AFTER IT IS FORMED, AND THEREAFTER AID ING IN ITS EXECUTION, BECOMES FROM THAT TIME AS MUCH A CONSPIRATOR AS IF HE ORIGINALLY DESIGNED AND PUT IT IN OPERATION.

United States v Standard Oil Co., 152 Fed. 294 of opinion.

Lincoln v Classin, 7 Wall 132

United States v Babcock, 24 Fed. Cases, 915, No. 14487.

United States v Cossidy, 67 Fed. 688, 702. The Anarchist Case, 122 Ill. 1.

United States v Johnson, 26 Fed. 682, 684.

Peop's v Mather, 4 Wend., 230."

(The above is taken from said brief of the United States, page 55.)

Troposition 12

THE CONTRACT OF FEBRUARY 24, 1806, BEING ILLEGAL AND VOID, THE DEFENDANT CREAMERY PACKAGE MANUFACTURING COMPANY OBTAINED NO TITLE TO THE LETTERS PATENT SUED ON IN THE INFRINGEMENT SUIT BROUGHT BY IT AGAINST THE PLAINTIFFS HEREIN, IT HAVING ACQUIRED SUCH

McMullen v Hoffman, 174 U. S. 629, 43 L. ed. 1117, 19

Sup. Crt. Rep. 839, and cases cited.

Connelly v Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed.
679, 22 Sup, Ct. Rep. 431.

Continental Wall Paper Co. v Voigt, 212 U. S. 227, 83

L ed. —, 29 Sup. Ct. Rep. 280.

Dunbar v Am. Telephone & Telegraph Co., (III), 87 M. E 521

Thomson v Thomson (1802) T Ves. 408. Levy v Kumus City (CCA) 168 F. 524. In the Councily case the U. S. Sup. Court said:

"If, according to the principles of the common law, the Union Sewer Pipe Company, could not have sold or passed title to any pipe it received

and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented." And in the Dunbar case the supreme court of Illinois di-

xectly held that an attempted conveyance of the capital stock of a corporation contrary to the terms of the Illinois antitrust statutes (similar to the Sherman Anti-Trust Act) "in voil and that "THE TITLE TO THE STOCK IN QUESTION NEVER PASSED FROM THE SELLERS" to the purch

In the Continental Wall Paper case, the court said:

"The case now before us in an entirely different one (different one from the Councily case.) The Continental Wall Paper Company seeks, in Ional effect, the aid of the court to enforce a contract for the sale and purchase of goods which, IT IS AD-MITTED BY THE DEMURRER, WAS IN FACT AND WAS INTENDED BY THE PARTIES TO BE BASED UPON AGREEMENTS THAT WERE AND ARE ESSENTIAL PARTS OF AN ILLEG-AL SCHEME." (Capitals are what is emplis In the opinion of the court.)

In the Thomesa case the plaintiff failed because he had no title to the money sucd for, because the title he had, if he d any, was by virtue of an illegal agreement. The English count mid:

"Then how are you to get at it except through this agreement? There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises." " Here you cannot stir a step but through the illegal agreement."

Proposition 13.

THAT THE CREAMERY PACKAGE MANUFACTURING COMPANY HELD ASSIGNMENTS OF THE PATENTS VALID ON THEIR FACE WILL AVAIL NOTHING; THE COURT WILL LOOK INTO THE WHOLE TRANSACTION.

McMullen v Hoffman 174 U. S. 639, 43 L. ed. 1117, 19

Sup. Ct. Rep. 839, and cases cited.

Proposition 14.

THE CREAMERY PACKAGE MANUFACTURING COMPANY COULD NOT ESTABLISH ITS CAUSE OF ACTION IN THE INFRINGEMENT SUIT WITHOUT RELYING ON THE ILLEGAL AGREEMENT, FOR IT HAD TO SET UP AND PROVE ITS TITLE TO THE PATENTS SUED ON, AND COULD ONLY DO THIS BY BRINGING IN THE ASSIGNMENTS WHICH WERE A PART OF THE ILLEGAL SCHEME.

McMullen v Hoffman 174 U. S. 639, 43 L. ed. 1117, 19

Sup. Ct. Pep. 839, and cases cited.

Continental Wall Paper Co. v Voight, 212 U. S. 227, 53 L. ed. —, 29 Sup. Ct. Rep. 286.

Proposition 15.

AN INTERLOCUTORY DECREE IN A PATENT INFRINGEMENT SUIT, PROVIDING FOR AN INJUNCTION AND ORDERING AN ACCOUNTING AND SENDING THE CASE TO A REFEREE TO ASCERTAIN THE AMOUNT OF DAMAGES, HAS NO FORCE AS AN ADJUDICATION IN ANY OTHER ACTION. THE DECREE MUST BE A FINAL DECREE TO HAVE SUCH EFFECT. THE DECREE IN THE SUIT BROUGHT BY THE DEFENDANT CREAMERY PACKAGE MANUFACTURING COMPANY AGAINST THESE PLAINTIPFS WAS ONLY INTERLOCUTORY. FURTHER, THE QUESTIONS OF MONOPOLY, RESTRAINT OF TRADE AND LACK OF TITLE ARE NEW IN THIS ACTION, AND WERE NOT LITIGATED OR AT ISSUE IN THE PATENT INFRINGEMENT SUIT, an shown by the pleadings in the patent is

fringement suit set forth in full in the complaint in this action. (Bill of complaint, page 124-124, Exhibit E-1, of Record. Answer pages 134-146, Exhibit E-2.)

HARMON V STRUTHERS (CCA) 48 F. 260.

Ex parte National Enameling & Stamping Co., 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404.

McGourkey v Toledo & Ohio Ry. Co. 146 U. S. 536. Smith v Vulcan Iron Works, 165 U. S. 518.

Humiston v Stainthrop et al., 2 Wallace 106.

The Keystone Maganese and Iron Co. v Martin, 132 U. S. 91. WATER, LIGHT AND GAS COMPANY V CITY OF HUTCHINSON (EIGHTH CIRCUIT) (CCA) 160 F. 41.

BRUSH ELECTRIC COMPANY V WESTERN ELEC-

TRIC COMPANY (CCA) 76 F. 761.

AUSTRALIAN KNITTING CO. V GORMLY (CC) 138 F. 92.

ROTH TOOL CO. V NEW AMSTERDAM CASULTY CO. (CC) (EIGHTH CIRCUIT) 161 F. 709.

## Proposition 16.

"THIS CONSPIRACY WAS A CONTINUING OFFENSE EVERY OVERT ACT COMMITTED IN FURTHERANCE THEREOF WAS A RENEWAL OF THE SAME AS TO ALL OF THE PARTIES. THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL THE COMMISSION OF THE LAST OVERT ACT. NEITHER CAN THE PARTIES CLAIM A VESTED RIGHT TO VIOLATE THE LAW.

Am. & Eng. Enc. of Law (2d. ed.), vol. 19, "Limitations of Actions."

United States v Green, 115 Fed. 343.

Ochs v People 124 III. 399.

Spies y People, 122 Ill. 1.

8 Cyc. p. 678."

(The above is taken from page 56 of said brief of U. S. See other cases there cited and text.)

## Proposition 17.

"IT IS AN ELEMENTARY PRINCIPLE OF EVI-DENCE THAT WHERE TWO OR MORE PERSONS ARE ASSOCIATED TOGETHER FOR SOME ILLEGAL PUR-POSE THE ACTS OR DECLARATIONS OF ONE OF THEM IN REFERENCE TO THE COMMON OBJECT ARE ADMISSIBLE AGAINST THEM ALL. 1 Greenleaf on Evidence, sec. 111.

2 Wigmore on Evidence, sec. 1079.

American Fur Co. v United States, 2 Peters, 358; 8 Curtis, 138.

Chine v United States, 159 U. S. 593. Wiborg v United States, 163 U. S. 656.

(The above is taken from page 62 of said brief of the United States. See other cases there cited and text.)

Proposition 18.

A COMBINATION BETWEEN TWO OR MORE IN-DEPENDENT AND COMPETING CORPORATIONS EN-GAGED IN MANUFACTURING AND SELLING UNDER LETTERS PATENT AND HAVING AN INTERSTATE TRADE AND COMMERCE, TO ELIMINATE THE COM-PETITION BETWEEN THEM AND CREATE A MONOP-OLY, IS IN VIOLATION OF THE SHERMAN ANTI-TRUST ACT.

BLOUNT MFG. CO. v YALE & TOWNE MFG. CO.

(C. C. Mass. 1909) 166 F. 555.

National Harrow Co. v Hench, (CCA), 83 F. 36, 39 L. R. A. 299.

National Harrow Co. v Hench (C. C.) 76 F. 667.

NATIONAL HARROW CO. v HENCH (C. C.) 84 F. 226. Bobbs-Merrill Co. v Strauss (copyright case) 139 F. 155. Strait v National Harrow Co., 18 N. Y. Sup. 224. National Harrow Co. v Bement, 47 N. Y. Sup. 462.

Mines v Scribner (C. C.) (Copyright case) 147 F. 927.

Also see Bement v National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747 (last paragraph of decision.)

We believe that the latest expression of any court on this subject is the first authority cited above, while an almost identical case with the instant case in the fourth case cited

above. We quote from the former as follows:

"When a patentee agrees, however, to restrain his own trade in the article of his own invention, not as an incident to a granting of rights, but for the purpose of enhancing his price by the removal of competitors, he is then quite outside the sphere of any right granted him by the government. He may engage in interstate trade or not as he pleases; but, being engaged in that trade, he is subject to all restrictions upon interstate tradera."

"A contract whereby the manufacturers of two

independent patented inventions agree not to compete in the same commercial field deprives the public of the benefits of competition, and creates a restraint of trade which results, not from the granting of letters patent, but from agreement. While the monopoly of the patented articles is not increased, the monopoly of the commercial field is increased by the UNIFIED TACTICS as to prices."

"Combinations between owners of independent patents, whereby, as part of a plan to monopolise the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent."

Proposition 19.

THE COURT WILL NOT RENDER ITS AID TO THE CARRYING OUT OF A SCHEME PROHIBITED BY THE SHERMAN ANTI-TRUST ACT.

National Harrow Co. v Hench (C. C.) 84 F. 226 (Involving the collection of a lot of patents and a suit to prevent infringement.)

Continental Wall Paper Co. v Voight, 212 U. S. 227, 53

L. ed. ---, 29 Sup. Ct. 280 and cases cited.

Levy v Kansas City (CCA) (8th Dist.) 168 F. 524, and many cases cited.

Northern Securities Co. v United States (Supra)

McMullen v Hoffman (Supra)

Thomson v Thomson (Supra), 7 Ves. 468.

Proposition 20.

EVERT COMBINATION RESULTING DIRECTLY OR MECESSARILY IN RESTRAINT OF INTERSTATE TRADE IS PROHIBITED. IT IS IMMATERIAL WHAT KIND OF A COMBINATION IT IS; NONE IS EXEMPT (WE CONTEND) UNDER THESE DECISIONS, THAT A COMBINATION TO PROSECUTE LAW SUITS IS AS MUCH PROHIBITED AS ANY OTHER.)

Loewe v Lawlor (Supra)

Northern Securities Co. v United States (Supra)

Joint Traffic Ass'n case (Supra)

Trans-Missouri Freight Ass'n case (Supra)

In the Northern Securities case we find the following (capitals ours):

"Although the act of congress known as the antitrust act has no reference to the mere manufacture
or production of articles or commodities within the
limits of the several states, it does embrace and declare to be illegal, EVERY CONTRACT, COMBINATION, OR CONSPIRACY, IN WHATEVER
PORM, OF WHATEVER NATURE, AND WHOEVER MAY BE PARTIES TO IT, which directly
or accessarily operates in restraint of trade or commerce among the several states or with foreign intions."

Proposition 21.

TO WRONGFULLY CHARGE INFRINGEMENT IS AN ACTIONABLE WRONG. This is true apart from any claim of violation of Sherman Anti-Trust Act. (ALSO TO RAY THAT A PERSON HAS NO PATENT, OR VALID PATENT).

Culmer v Camby (CCA) 101 F. 195, 41 CCA 302.

25 Cye. 263.

Bowsky v Cimotti Unhairing Co., 76 N. Y. Sup. 465.

Watson v Trask, 6 Ohio 531, 27 Am. Dec. 271.

Cousins v Merrill, 16 U. C. C. P. 114.

Meyrose v Adams, 12 Mo. App. 829.

25 Cyc. 559.

Flint v Hutchinson Smoke Burner Co. 110 Mo. 492, 19

S. W. 804, 33 Am. St. Rep. 476, 16 LRA 243.

Germ Proof Filter Co. v Pasteur Chamberland Filter Co. 81 Hun. (N. Y.) 49, 30 N. Y. Suppl. 584.

Wren v Weild L. R. 4 Q. H. 731, 10 B & 8 51, 38 L. J. Q.

B. 327, 20 L. T. Rep. N. S. 1007.

Swan v Tappan (Copyright) 5 Cush. (Mass.) 104.

McElwee v Blackwell (Trademark case), 94 N. C. 261.

Snow v Judson, 38 Barb, 210.

Dicks v Brooks (Copyright) L. R. 15 Ch. Div. 22.

Barley v Walford (Copyright) 9 Q. B. 197.

We quote hereinafter in full the article held libelous in the first case above cited.

Proposition 22.

TO TAKE AWAY PLAINTIFF'S CUSTOMERS BY IN-TIMIDATION AND THREATS RENDERS DEFEND-ANTS LIABLE TO DAMAGES UNDER THE SHERMAN ANTI-TRUST ACT.

Loewe v Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct.

Rep. 301, 13 A & E Ann, Cases 815.

Peoples Tobacco Co. v Am. Tobacco Co. (CCA) 170 F. 396.
Proposition 23.

From the foregoing it must appear that the contracts of April 19, 1897, were in fact (at least if made to do away with competition) illegal and void. Three witnesses testified that one of the main actors in bringing about those contracts stated that they must be executed to do away with the competition between the concerns going into them. There is a clause in one of them providing that the DISBROW MANUFACTURING COMPANY AND ITS STOCKHOLD-ERS SHALL NEVER AGAIN "ENGAGE IN THE CHURN OR BUTTER WORKER BUSINESS, EITHER MANU-FACTURING OR SELLING" (middle of page 91). means that they shall not engage in manufacturing under letters patent OR NOT UNDER LETTERS PATENT, and that they shall not engage in selling such patented articles OR ARTICLES NOT PATENTED. There is nothing here limiting this prohibition to any locality, like a city or town, for a limited time. IT WAS INTENDED TO EFFECTU-ALLY AND FOREVER wipe out the competition, and create a monopoly. A jury is entitled to so hold. And all those contracts made on said April 19, 1897, must be taken and read together.

That the contract of February 24, 1898, is illegal and rold must go without saying, and for the same and many other

reasons.

Also the contract of June 4, 1898, between the two defendant companies, which gave effect and body to the monopoly, is fliegal and void. Certainly it is, if a part of the same scheme, and that it is a part of the same scheme is too apparent to permit discussion. BY THESE THREE CONTRACTS OR SETS OF CONTRACTS THE MONOPOLY IS SECURED TO THE CREAMERY PACKAGE MANUFACTURING COMPANY, WITH A SLICE OF THE BENEFITS TO THE DEFENDANT OWATONNA MANUFACTURING COMPANY. IF WE LEAVE OUT ANY ONE OF THOSE CONTRACTS, THERE IS A MISSING LINK.

### DIVISION 1.

(Corresponding with Division 1 of the assignments of Error.)
(An index to the complaint by paragraphs is appended to the end of this brief.)

(Assignments of Error 1, 2, 3, 4, 5, 6.)

#### A

The complaint in this action is not limited to any one theory of this case. It sets forth the acts of the defendants beginning with the contracts of April 19, 1897, and ending with the beginning of this action and includes a history and statement of all the acts of defendants, or any of them, including a full set of the plendings in the two patent suits, which have been hereinbefore in this brief referred to. And we allere that all those acts, including the prosecution of said two infringement suits, and everything mentioned or referred to in the complaint, was done pursuant to the scheme and conapiracy of the defendants, to secure their said monopoly and in restraint of trade. We view each contract, and the prosecution of each suit and the circulation of reports, slanders, libels and threats as a step in the proceeding.—a means to the one end. Some of these contracts in themselves are plainly illegal under the Sherman Anti-Trust Act; others of them when considered alone have the merit of being free from this objection. The assignments of the patents, for instance, from the Fargo Company to the Creamery Package Manufacturing Company, when looked at alone are valid; but when the whole contract (that of February 24, 1898), providing for those assignments, is considered, it is seen at once that those assignments of patents stand in no better position than the main contract itself. In other words, as stated in Walter A. Wood Mowing and Reaping Co. v Greenwood Hardware Co. (75 S. Car. 378, 9 A & E Ann. Cases 902), "A contract may be lawful in itself as an isolated matter but yet be unlawful as a part of a scheme to create a virtual monopoly." To same effect is Swift & Co., v United States (196 U. S. 395, 49 L. ed. 523. 25 Sup. Ct. Rep. 276) and Loewe v Lawlor (1908) (208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301).

THE CONTRACT OF FEBRUARY 24, 1888, IS THE CONTRACT PROVIDING FOR THE TRANSFER, AND BY WHICH THE PARTIES INTENDED TO TRANSFER, THE VICTOR CHURN PATENTS FROM THE FARGO COMPANY TO THE CREAMERY PACKAGE COMPANY. THE EXECUTION OF WRITTEN ASSIGNMENTS LATER WAS A MERE FORMAL MATTER. THERE WAS NO NEW CONSIDERATION, NO NEW CONTRACT (testimony of F. B. Fargo, page 488-491). The court will consider the whole transaction. As the U. S. Supreme Court said in McMullen y Hoffman (supra):

"These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance, which was not necessary for plaintiff to prove."

It is likewise with the joint prosecution of the two infringement suits against these plaintiffs. When either one of those suits is considered by itself, it is one thing; when the joint action of the complainants therein in prosecuting them is considered, it is quite a different thing; and when it is also considered that the prosecution of them was a part of the whole general scheme (in the contemplation of the parties when they collected their patents in 1897 or 1898 to "control the world." Third answer from bottom of page 311), the situation is very much emphasized. That the prosecution of those law suits may be a part of an illegal scheme, and hence give rise to a cause of action for damages to these plaintiffs, EVEN IF EACH COMPLAINANT HAD A GOOD CAUSE OF ACTION IN ITS SUIT, will be hereinafter considered. Such position is directly foreshadowed, if not fully announced, in the decisions of the United States Supreme Court; for, as quoted by the United States Suoreme Court in Lowe v Lawlor (Supra) from Aikens v Wisocnsin (195 U. S., 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3):

"NO CONDUCT HAS SUCH AN ABSOLUTE PRIVILEGE AS TO JUSTIFY ALL POSSIBLE SCHEMES OF WHICH IT MAY BE A PART. THE MOST INNOCENT AND CONSTITUTIONALLY PROTECTED OF ACTS OR OMISSIONS MAY BE MADE A STEP IN A CRIMINAL

PLOT, AND IF IT IS A STEP IN A PLOT, WELL THER ITS INSOCENCE NOR THE CONSTITU-TION IS SUFFICIENT TO PREVENT THE EMENT OF THE PLOT BY LAW."

And in Sational Harrow Co. v Hench (CCA), 83 P. 26, 29 LBA 250, the Court possed directly upon the conduct of using the Invenit method of securing a monopoly in potented articles, wherein the court says, after holding that a combination of different patentees to eliminate competition and form a monopoly of an entire industry is illegal under the act, as otabiente):

The suggestion that the contract (the illegal con-tract of combining all the patents) is justified by the situation of the parties—their exposure to liti-gation—is entitled to no greater weight. Patentees may compare their differences, as the owners of other property may, BUT THEY CANNOT MAKE THE OCCASION AN EXCUSE OR CLOAK FOR THE CREATION OF MONOPOLIES TO THE PUBLIC DISADVANTAGES

One ground or claim of liability on the part of defendants to these plaintiffs is due to the fact that the defendants circulated reports (libels and standers) among the customers of plaintiffs in the different states, to the effect that the churm of plaintiffs were an infringement of the letters patent held by the defendants, particularly the "Disbrow Patents," and threatened such customers with infringement suits, and thereby destroyed the plaintiffs interestate trade and commerce. We will quote the testimony showing these things. Not only is these here likel and stander, but there is also the threats and intimidation which, it is stated in People's Tobacco Co. v American Tobacco Co. (CCA) (supra) 170 F. 336, gives a cause of action under the Act.

The witness Ladd (p. 450) testified that he was doing miness in Michigan (p. 450); that he handled and sold the surns of plaintiffs for about six menths (p. 451), and he says that he received letters from Paul & Paul (the attorneys for the complainant in each said patent suit), and he states in his testimony as follows (beginning on page 453 and ending on page 455). In all these quotations we will put in capitals these portions we wish to emphasine) o portions we wish to complainte)

QSL State in relatance as near as you can

the contents of those letters.

"A. The letters I received from Paul & Paul were in substance that the Crenmery Package Mfg. Co. or the Owatonna Mfg. Co. were suing the Owatonna Fanning Mill Company for an infringement of their patent.

Q52. Did you say patent or patents?

A. I think I said patents. And THEY WARN-ED ME AGAINST SELLING THESE MA-CHINES TO THE TRADE, GIVING ME TO UN-DERSTAND THAT they would proceed against me, no THEY WOULD HOLD ME LIABLE, AS WELL AS HOLD THE USERS OF THE MA-CHINE LIABLE FOR ANY DAMAGES THAT MIGHT BE INCURRED.

Q53. You stated that they gave you to understand that they would hold you liable, and your users, for damages. State as near as you can the substance of the language of the letters in regard to that.

A. That is very hard for me to state. It has been a good many years since that was written.

Q54. But you now remember the impression you received of the meaning of those letters at the time you received them?

A. Very distinctly.

Q55. Have you given us as you remember that impression which you received from those letters at thetime you received them?

A. Yes, sir.

Q58. Did you see any of those letters?

A. I believe that the letter written to the Wa-

Q5%. Where is that letter now?

A. I am unable to say, I can't find it.

Q60. Give us the contents of that letter as near as you can remember?

A. The letter was very similar to the one written me, advising them of the pending suit AND THAT THIS OWATONNA CHUBN WAS AN INFRINGEMENT ON THEIR PATENT. I ALSO BELIEVE THAT THEY STATED THAT

USERS OF HE CHURN WOULD BE HELD LIABLE FOR DAMAGES.

Os How was that letter signed?

A. It is my impression that this letter was signed by Paul & Paul, attorneys for the—I think it was signed as Paul & Paul. In that letter, however, they mentioned the fact that they were attorneys either for the Owatonna Mfg. Co., or the Oreamery Package Co., I have forgotten which.

Q62. After you received knowledge of those patent suits what kind of business did you have in the sale of the Owatonna churn?

A. Naturally it was very limited.

Q63. After you received knowledge of the infringement suits did your business of selling the Owatonna churn increase or decrease or remain about the same, or how?

A. It is very hard to compare it for I received this notice very shortly after the first churns were sold. We very soon afterwards discontinued the sale of these machines, however.

Q64. Please sate the reason why you did so discontinue?

A. Naturally we didn't like to lay ourselves liable to large damages on the sales of churns in this state, providing of course that the other parties should win these suits.

Q65. You say "naturally," which might be urged as an objectionable method of answering the question on the trial of this case. Please state the fact as to why you did discontinue the handling of the Owatonna churn.

A IN MY JUDGMENT I FELT THAT IT WAS NOT BEST FOR ME TO LAY MY CONCERN OPEN TO LITIGATION AND LIABLE FOR HEAVY DAMAGES PROVIDING THIS CHURN SHOULD PROVE TO BE AN INFRINGEMENT; SO WE DISCONTINUED THE SALE OF IT, FIGURING THAT IF THERE SHOULD BE SUITS FOR INFRINGEMENT STARTED ON THE SMALL AMOUNT OF CHURNS WE HAD SOLD WE COULD STAND

THEM; BUT WE DIDN'T CARE TO GET INTO THE MATTER TOO DEEP."

Also this same witness testified beginning at the bottom of page 456 and continuing on page 457);

"Q78. About the time you discontinued handling the Owntonne churn how general, if you know, HAD RECOME THE KNOWLEDGE OR INFOUNTION THAT THE OWNTONNA CHURN WAS CLAIMED TO BE AN INFRINGEMENT as you have testified?

A. QUITE GENERAL AMONG THE CREAM-ERY TRADE.

Q79. AFTER IT HAD BECOME QUITE GEN-ERAL and you tried to make sales of the Owntonna churn what reasons were assigned by proposed purchasers for not buying the Owntonna churn?

A. IN SOME CASES PURCHASERS WOULD INTIMATE THAT THEY DID NOT CARE TO BUY A MACHINE THAT WAS TIED UP IN LITIGATION, AND WE SOON AFTER THIS LAW SUIT WAS GENERALLY KNOWN, DISCONTINUED THE SALE OF THESE MACHINES.

Q80. Did or did not either one of the letters which you received from Paul & Paul state anything about the name of the patents which they claimed were infringed by the Owatonna churn?

A. After receiving their first letter I believe that I wrote them asking what their claims were, and in reply they cited, as I remember it, their claim COVERING A BACK GEABING OR TWO SPEED GEAR FOR COMBINED CHURN AND BUTTER WORKER."

(The "two-speed" patent was the patent sued on in the patent infringement suit brought by the Owatonna Manufacturing Company against these plaintiffs).

Also this same witness testified on page 464;

"Q220. Now can you recall any more specifically than you did this morning what was said in the letter from Paul & Paul to you in which you say he stated what claims or putents owned by either the Owatonna Mfg. Co. or Creamery Package Mfg. Co. were infringed by the Owatonna churn?

A. I do not think I can.

Q221. Was it stated in that letter that the patents infringed by the Owatonna churn were those belonging to the Owatonna Mnfg. Co?

A. I THINK IT WAS, or at least by their clients. Q222. Did they use the word "clients?"

A. It is my recollection that their letter stated that they were writing for their clients and that they had charge of this suit for infringement.

Q223. Who did they my were their clients?

A. I believe they named the OWATONNA MFG. CO. but I am not sure that they named the Creamery Package Co.

(THESE ARE THE LETTERS PATENT WHICH THESE PLAINTIFFS NEVER INFRINGED, AS HELD BY THE COURT IN THE PATENT SUIT BROUGHT AGAINST THESE PLAINTIFFS BY THE DEFENDANT OWATONNA MANUFACTURING COMPANY).

The witness Mource (p. 467) states that he was a traveling salesman selling the churns of these plaintiffs in Bouth Dakota, Northwestern Iown, Southwestern Minnesota and North Dakota (p. 468) and this witness testified that Mr. Woodring, an agent of the Creamery Package Manufacturing Company (middle of p. 470), THREATENED THE CREAMERY COMPANY AT COON RIVER, STATE OF IOWA, THAT IF SAID COMPANY USED THE CHURN OF PLAINTIFFS "THEY WOULD BE SUED FOR INFRINGEMENT" (lines 7 and 8 from top of page 472), and he testified in reference to that (p. 472):

"Q40. When Mr. Woodring said, in substance, that the creamery company was to be said for infringement if they used the churn of the Owatonna Fanning Mill Company, DID MR. WOODRING SPECIFY THE PATENT OR THE NAMES OF THE PATENT on which the Creamery Company would be sued?

A. Yes.

Q42. State what Mr. Woodring said?

A: HE SAID THY WERE INFRINGE

MENTS ON THE DISBROW PATENT.

Q42. WHAT WAS AN INFRINGEMENT OF THE DISBROW PATENT IF HE SAID?

A. THE CHURN MANUFACTURED BY THE OWATONNA FANNING MILL COMPANY."

And this some witness mys of that transaction and what followed it, as follows (beginning on page 473 and continuing on page 474):

"Q49. When Mr. Woodring stated that the company would be used if they used this churn, who was present?

A. The full creamery board, Mr. Woodring and myself,

Q50. How many composing the board?

A. I thing it was five, it may have been seven, I don't remember.

Q51. AFTER THAT YOU CONTINUED TO TRY TO SELL THE BAME CHURN UNTIL ABOUT 1965?

A. NO, I DIDN'T PUSH THE CHURN ANY MORE AFTER THAT.

QS2. WILL YOU STATE THE REASON WHY YOU DID NOT?

A. I didn't want to be bothered with that kind of a fight. I got another churn to handle.

QSS. Why did you change from selling the churn made by the Owatonan Fanning Mill Company to some other churn? Give your reasons in full?

A. Well, I did it principally BECAUSE I DEEMED IT MORE THAN THE CHURN WAS WORTH TO KEEP IT IN THE CREAMERY AFTER I GOT IT THERE and then I got hold of a churn that I liked fully as well without having that trouble.

Q54. WHY WAS IT DIFFICULT TO KEEP THE OWATONNA PANNING MILL CHURN IN A CREAMERY AFTER YOU GOT IT THERE?

A. BECAUSE MY COMPETITORS LAID BOWN ON ME TOO HARD."

The witness Crimmore (bottom of page 251) who was namager of a creamery in Steele County, Minnesota, (page

352), testified that his creamery proposed to buy a churn, and he testified as follows, beginning on page 353, and ending on page 355 (the Mr. Rice mentioned in his testimony here was an agent of the Creamery Package Manufacturing Company:

Q. DID THE BOARD MEET AND CONSIDER THE CHURN WHICH THEY WOULD BUY?

A. They did.

Q. DID THEY MAKE UP THEIR MINDS BEFORE THEY MADE THE PURCHASE?

A. THEY DID.

Q. WHAT CHURN DID THEY AGREE UPON?

A. THE VIRTUE CHURN.

Q. THAT IS THE CHURS MADE BY MR. VIRTUE OR THE OWATONNA FANNING MILL COMPANY, AT OWATONNA? A. YES, SIR.

Q. AFTER THE BOARD HAD AGREED UP-ON THE BUYING OF THE CHURN FROM MR. VIRTUE DID YOU HAVE ANY TALK WITH MR. RICE WHO WAS THERE REPRESENT-ING THE CREAMERY PACKAGE CO? A. WE DID.

Q. WHAT CONVERSATION DID YOU HAVE WITH MR. RICE THEN?

A. In our talk with Mr. Rice we proposed to buy several things from him, andasked him to submit prices without the churn, HE TOLD US WE WERE TAKING CHANCES IF WE BOUGHT MR. VIRTUE'S CHURN and we did not buy it.

Q. In what way did he say you were taking chances in buying Mr. Virtue's churn?

MR. COHEN. That is objected to as leading.
THE COURT. I think he has answered your question.

Q. Will you please give it again, all of it, if the court will permit?

THE COURT. He has already stated it.

Q. You have given it all have you?

A. THAT WE WOULD GET INTO TROUBLE IF WE TOOK THAT CHURN.

Q. AFTER YOU HAD THAT TALK WITH MR. RICE, WHATEVER IT WAS, and you have given us the talk, WHAT WAS DONE BY

YOUR BOARD IN THE WAY OF CHANGING FROM THE VIRTUE CHURN TO ANY OTHER, CHURN, if you did so?

A. ON ACCOUNT OF THAT WE BOUGHT THE DISBROW CHURN.

Q. ON ACCOUNT OF WHAT? A. Of the threats of Mr. Rice.

MR. COHEN. I move to strike out the word "threats."

THE COURT. The motion is granted.

Q. DID YOU CHANGE FROM THE VIRTUE CHURN TO THE CREAMERY PACKAGE COMPANY'S CHURN ON ACCOUNT OF WHAT MR. RICE TOLD YOU?

A. WE DID.

Q: DID YOU THEN BUY THE DISBROW CHURN? A. WE DID.

Q. WHOM DID YOU BUY IT THROUGH OR FROM?

A. THROUGH THE CREAMERY PACKAGE MFG. CO.

Q. THROUGH MR. RICE? A. THROUGH MR. RICE, YES.

The witness Barlass (p. 503) testified that he was with the National Creamery Supply Company of Chicago (p. 504) and that they were doing business in the states of Michigan, Indiana, Illinois, Minnesota, Wisconsin and Iowa (two thirds of the way down from the top of page 514), and this witness testified as follows, beginning at the bottom of page 506 and continuing through P. 507 and the first half of page 508):

"Q40. While you were with the National Creamery Supply Co., did you handle, or did that company handle and have for sale the combined churn and butter workers made by the Owatonna Fauning Mill Co.? A. Yes.

Q41. Did you personally have anything to do with making sales and trying to make sales to prospective purchasers of a churn made by the Owatonna Fanning Mill Co? A. Yes.

Q42. Was that true during all the time you were with the National Creamery Supply Co? A. I don't understand the question.

Q43. Did you while you were with the National Creamery Supply Co., make any sales of a churn made by the Owatonna Fanning Mill Co? A. Yes.

Q44. That was during what part of the time that you were with the National Company, meaning the National Creamery Supply Co?

A. During the third year with them.

Q45. HOW DID THOSE CHURNS WORK THAT YOU SOLD DURING THAT PERIOD?

A. SATISFACTORILY.

Q46. About when did you discontinue the sale of the Owatonna Fanning Mill Co. churns?

A. About the beginning of 1905.

Q47. Did you then take up the sale of any other churn in the place of the Owatonna Fanning Mill Co. churns? A. Yes, sir.

Q48. What churns? A. The Simplex.

Q49. What did you call the churn made by the Owatonna Fanning Mill Co., which you sold? A. The Owatonna.

Q50. WHY DID YOU CHANGE FROM THE OWATONNA CHURN TO THE SIMPLEX CHURN?

A. BECAUSE WE WERE UNABLE TO MAKE SALES OF THE OWATONNA CHURN. Q52. FOR WHAT REASON?

A. THERE WAS CONSIDERABLE QUESTION AMONG THE TRADE ABOUT WHETHER THE OWATONNA WAS AN INFRINGEMENT ON THE DISBROW CHURN PATENTS.

Q53. How did you become aware of that condition in the trade?

A. Why, personally I first heard of it of E. W. Ward of St. Paul.

Q54. HOW, IF AT ALL, WERE YOU MADE AWARE OF THAT IN YOUR TRADE?.

A. Our salesmen reported that where they were figuring on or quoting an Owatonna churn THE CUSTOMER HAD BROUGHT UP THE POINT THAT HE HAD BEEN ADVISED FROM OTHER SALESMEN OR OTHER SOURCES THAT THE OWATONNA WAS AN INFRINGEMENT, on

another churn or churns, AND THAT HE WOULD BE LIABLE TO BE SUED FOR INFRINGE-MENT IF HE BOUGHT AND USED ONE

Q55. When, if at all, did you hear that suit had been brought against the Owatonna Fanning Mill Co. for infringement?

A. Some time in 1905, as I remember it.

In this testimony the charges made by the combination were that these plaintiffs infringed the patents of the Owatonna Manufacturing Company, and the threats of suits were under these patents of the Owatonna Mfg. Co. THAT THE
PLAINTIFFS NEVER INFRINGED THESE PATENTS
WAS ADJUDICATED IN THE PATENT SUIT BROUGHT
BY THE DEFENDANT OWATONNA MANUFACTURING
COMPANY AGAINST THESE PLAINTIFFS. The final decree in that suit is binding upon all these defendants; for they
all openly took part in the prosecution of that suit. (Cannon
River Mfgr's Ass'n. v Rogers, 42 Minn. 123, 43 N. W. 792). On
the trial of the instant case at Winona we offered to prove that
they never infringed these patents, which the trial court
refused. (The court was possibly right on account of the conclusive nature of the final decree).

Therefore, all these statements, threats and claims were false and constituted slanders and libels as well as threats and intimidations. They were largely circulated by the Creamery Package Manufacturing Company. But their circulation was given force and effect by reason of the fact that infringement suits had been brought against these plaintiffs BY EACH OF THE DEFENDANT COMPANIES. And the defendant La Bare signed and verified the bill of complaint (P. 109) in the suit brought by the Owatonna Manufacturing Company. It was easy for the defendants to see that to bring patent suits first and then circulate their slanders and libels, threats and intimidations, would have a much greater effect in destroying the plaintiffs interstate commerce and trade.

Therefore, we have a case where the interstate trade and commerce of the plaintiffs was destroyed by acts of defendants which acts were in themselves wrongful and a tort, outside of and apart from any claim that they were such also under the Sherman Anti-Trust Act. It is clearly a case where the defendants would be liable to these plaintiffs for injurying and destroying the trade and commerce of these plaintiffs, whether

the defendants were or were not themselves engaged in interstate trade and commerce, within the case of Loewe against Lawlor (supra).

In the Loewe against Lawlor case the acts of the defendants naturally and necessarily destroyed and took away the trade and commerce of the plaintiffs. There is nothing in the opinion of the Supreme Court in that case stated as relied upon to make the defendants there liable aside from that. The opinion in that case does not place the liability of the defendants upon the ground that they were committing any tort, aside from being contrary to the terms of the Act.

The defendants in that case were not excused even though they were engaged in a business or transaction which was admittedly to advance their own interests. It is of the highest importance that the trade and commerce of the United States be not directly interferred with, and the person who directly destroys the same must have some better excuse than that offered in the Loewe against Lawlor case.

The acts of the defendants in this action in circulating their slanders and libels and in threatening suits for infringement against prospective customers of plaintiffs, WAS SOME-THING WHICH MUST NECESSARILY DESTROY AND TAKE AWAY THE PLAINTIFFS TRADE. No one can see this plainer than this court which knows something about the tremendous expense incident to an infringement suit; and that such means could be accomplished with deadly effect was well known to all the defendants and their attorneys. THE DEFENDANTS DID NOT RELY ON THEIR IN-PRINGEMENT SUITS; PERHAPS THEY WERE AFRAID THEY WOULD FALL DOWN. Their slanders, libels and threats were what brought the results. It might be said that each of the defendants was entitled to prosecute an infringement suit to try out its patents. While this is true, (if they did not attempt to get title to the patent used on through illegal agreements or as a part of a scheme of monopoly), it does not authorize the joining together of the defendants and the prosecution by them of two suits by concurrent action, as we shall attempt to hereinafter show. Neither did it justify the defendants in going out and making statements to the trade which statements were not true. The fact of the circulating by the defendants of these statements and threats CHARACTERIZES THE CONDUCT OF THE DEFEND-

## ANTS AND DISCLOSES THEIR GENERAL MOTIVE.

The above reports are not confined to statements that the defendants had brought suits against plaintiffs. The directly charged infringement by plaintiffs of defendants' patents; and infringement suits were threatened against plaintiffs' prospective purchasers, which suits were never brought.

That the circulating of these reports gives these plaintiffs a right of action against defendants for libel and slander is conclusively held in the authorities given under "Proposition 21" of this brief.

We will quote in full the article relied on in the first case cited under that proposition (Culmer v Canby (CCA) 101 F. 195). as constituting a libel. The article appeared in a newspaper, ostensibly purporting to give an accurate narration of a proceeding in court. The article, in full, is as follows:

"Important Lawsuits."

"Suit was filed in the United States court at Pittsburg, Pa., on August 6th, by the underssigned, the Computing Scale Company of Dayton, Ohio, against the Keystone Store-Service Company of Beaver Falls, Pa., for infringing computing scale patents owned or controlled by the Dayton company. As the peculiarities of this case, making it one of unusual importance, a short story of the matter may not be amiss: Early in the year 1891 John W. Culmer, now at the head of the Keystone Store-Service Company, as general manager, sold to the Dayton company certain patents on a computing scale wholly different from anything in that line that is now made; making certain representations, which the Dayton company now claim to be fraudulent. At the time, the Dayton company employed this Jno. W. Culmer, as an inventor, to take charge of its experimental department and other matters in its factory. On account of the above alleged fraudulent representations, and the inability of the said John W. Culmer to perform certain things claimed by him, the Dayton company filed suit March last against the said John W. Culmer and others associated with him for \$10,000 damages on account of such alleged fraudulent representa-Furtheremore. tions. after

than a year's service, the Dayton company dispensed with the services of the said Culmer, about which time the said John W. Culmer carried from the office of the Dayton company certain drawings of a computing scale practically the same as the scale now made the Keystone Store-Service Company, and for the manufacture of which suit was brought on the 6th inst. for infringement. In view of the above facts the Dayton company claims ownership in and to the scale made by the Keystone Store-Service Company, and, as heretofore stated, will protect its interests by asking the courts to compel the said Jno. W. Culmer and the Keystone Store-Service Company to assign all of their right and title to such patent or patents when issued.

"The Computing Scale Company,
"O. O. Ozias, Gen. Manager.

"Dayton, Ohio, August 12, 1895.

"P. S. To merchants and dealers using scales this case is of extreme importance, as the courts have held that all persons using infringing machines are liable for damages."

The CCA overruled the decision of the lower court sustaining a demurrer, in this language: (after stating elemen-

tary rules as to libel)

"Accepting these settled rules of decision, and remembering that a demurrer can only be sustained where the court can affirmatively say that the words are incapable of any reasonable construction which will render them defamatory, we are of opinion that the alleged publication in this case, when properly pleaded, is not open to general demurrer, but its application and meaning should be left to the jury, under proper instructions as to what constitutes a libelous publication."

When we compare what was held might be libelous (in the determination of the jury) in the Culmer v Camby case with what was written and said in the instant case, we at once see how insignificant the former is as compared with the latter. In the instant case there were DIRECT CHARGES OF IN-

FRINGEMENT, ALL OF WHICH CHARGES WERE WHOLLY FALSE. In the instant case those charges were followed up WITH THREATS OF INFRINGEMENT SUITS UNDER THE DISBROW PATENTS AGAINST PURCHASERS AND PROSPECTIVE PURCHASERS AND USERS.

In the case of Loewe against Lawlor (supra) the interstate commerce of the plaintiffs was taken away and destroyed BY THREATS AND INTIMIDATION, and it was held that the plaintiffs could recover therefor, and we ought to say that the threats and intimidation in that case were mild as compared with those in the instant case. Their purpose and effect is established in this case without attempt at contradiction.

According to the decision of the lower court in the instant case, if a trust and monopoly brings a suit for infringement, it can then go out and, through its hired attorneys, agents, servants and employees, circulate all kinds of libels and slandders as to infringement, and can intimidate and make all kinds of threats of infringement suits, and totally destroy the business of its rival thereby, and thereafter fail in its infringement suit and yet there is no remedy. It is a case of damnum absque injuria. Although the occasion might justify somewhat stronger language, we will say simply that the authorities are to the contrary. The trial court held that AS A MATTER OF LAW those libels, standers, threats and intimidation MUST BE connected up with and read into the procecution of the two infringement suits, the trial court did not even permit ANY QUESTION OF FACT in connection therewith TO BE SUBMITTED TO THE JURY.

The damages alleged in the complaint in this action are not general damages but are in each case special damages.

The circulating of those slanders and libels is chargeable to all the defendants, as a part of the conspiracy in the destruction of plaintiffs' business. This is shown by several considerations: (1) The attorneys for both defendant corporations sent out these claims and reports; those attorneys were acting as much for one corporation as the other. (2) They have their proper place and nicely fit in as a part of the scheme, and accomplish the very monopoly which the defendants were seeking to accomplish. (3) In most every case the claim was that the plaintiffs herein were infringing THE DISBROW PATENTS. (4) The alleged illegal scheme and arrangement

between the two defendant corporations inturally placed it in the power of the Cromery Puchage Manufacturing Coupany to circulate those reports, and give to the Cromery Puckage Manufacturing Company a standing in circulating those reports, and placed the Cromery Puckage Manufacturing Company in a position where the circulating of those reports by that company would have effect,—that company being the seller of the Disbrow churns. (5) Both defendant corporations took and enjoyed advantages from such conduct. We contend that if any one of the defendants, acting

We contend that if any one of the defendants, acting alone, had circulated these libels and standers, and thoreby directly destroyed the plaintiffs' interstate trade and commerce, such person would be liable in damages to the plaintiffs under the Sherman Anti-Trust Act. The decision of the United States Supreme Court in the case of Chattanooga Foundry and Pipe Works et al vs City of Atlanta, (203 U. S. 200; 51 L. ed. 261; 27 Sup. Ct. Rep. 65) is a direct authority for this proposition. In that case the City of Atlanta purchased pipe OF ONE CORPORATION at an exorbitant price. It was held that the city was entitled to recover three times the difference between the normal price and the inflated price which it paid. The point was made that the pipe was bought of one corporation alone and that this particular sole was so remotely connected with the unlawful combination such that the city could not recover. But the United States Supreme Court distinctly overruled this proposition, saying (Capitals ours):

"Finally, the fact that the sale was not so connected in its terms with the unlawful combination so to be unlawful (Connelly v Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 670, 22 Sup. Ct. Rep. 431) in so way contradicts the proposition THAT THE MOTIVES AND INDUCEMENTS TO MAKE IT WERE SO APPROTED BY THE COMBINATION AS TO CONSTITUTE A WINDRE."

In the case at har the circulating of these libels, slanders and threats, could be read right into the combination as used for the purpose of carrying out and accomplishing its purpose and ends. Of cause in the Atlanta case there was no claim or showing THAT IN THE CONTRACT OF COMMUNATION ITSELF there was any agreement for rise of prices, as we understand the case. In the Atlanta case the raising of prices

was a result,—NOT A NECESSARY RESULT—of the manapoly; It was not A PART of the original contract, combination or conspiracy; it was something which the defendants might do IN ONE YEAR or IN TEN YEARS after the full completion of the contract, conspiracy or combination. It was something secondary. In the case at his the circulation of the slanders, libely and threats WAS ONE OF THE ACTS AND STEPS OF DEFENDANTS IN SECURING AND MAINTAINING THEIR SAID MONOPOLY; there is nothing secondary or remote about this. Those acts might or might not have been necessary; whether they were or not, they were appropriate, and the defendants saw fit to use them AND BY THEIR USE THEY ACCOMPLISHED THEIR MONOPOLY. Those libels, slanders and threats were material every acts in the growth and development of this monopoly.

Futhermore, the defendant Creamery Package Manufacturing Company, AS THAT CONCERN IS NOW CONSTI-TUTED, cannot be considered in this action as one sole, independent, legal corporation. IT IS A COMBINATION OF MANY CORPORATIONS AND PERSONS. This position is foreshadowed by the concurring opinion of Justice Brewer in the Northern Securities once, where he says: "It must also be remembered that under present conditions a single railrand is, if not a legal, largely a practical, monopoly; and the arrangement by which the control of these two competing rands was mergal in a single corporation broadens and extends such mosopoly." The Creamery Package Manufacturing Company in trieff is a combination within the mouning of soction I of the Cherman Anti-Prust Act: it is certainly as much so as the Northern describles Company which was also a single exponetion. It represents under that one name the old Creamery Package Manufacturing Company, the two Parge companies, the two Cornich, Curtic & Greene companies, the Barber company and the partnership of C. B. Hill & Company. This concern, acting under this name, has distinctly placed thatf in this penielectrel to be, -a combination of all those cancerns. that concern in itself is a combination in restraint of traile within the meaning of section I of the liberman Anti-Print Art, and any and every art which that concern does alone (without any contract, completely or combination with any one class in the furtherance of its apparent and only purpose

for existence, which restrains interstate trade, makes that concern liable under the Act, although it is in name only one corporation. That concern is no less a combination than the defendants in the case of Loewe against Lawlor (supra) in which case the defendant was a labor union. Also the Creamery Package Mig. Company is in fact the real monopoly in this case. It not only enjoys the advantage which a monepely can give to it as the manufacturer and seller of the Victor churns (45 per cent. of the whole), in which this company is alone Interested, BUT IT ALSO ALONE derives NEARLY ALL the advantages which can be derived by those means from the manufacture and sale of the Disbrow churns, made by the defendant Owatonna Manufacturing Company. We have already shown how the former company, on the perfection of the monopoly, rulsed the prices of the Disbrow churn and pocketed for a number of years the whole of the increase (of course under the claim of increased cost of manufacture!!!) and it has never given to the Owatonna company ONLY A PART of that increase of prices, -undoubtedly just a living wage. The Owatonna company never had anything whatever to say about the terms or conditions of the sale to users of its churus. Owntonna company in fact plays second fiddle. The Creamery Package Manufacturing company is the real thing, the real monapoly.

Wherefore the Creamery Package Manufacturing Company can be held in this case, for the reason that it is directly liable under section 2 of the Sherman Anti-Trust Act which provides that "MVMHY PMMMIN" who attempts to or does secure a manapoly of any part of the trade of the United States shall be guilty of a missbenessor. Here no "contract, combination in the form of trust or otherwise, or conspiracy," is necessary; there need be no second corporation or person with whom the main actor has contracted, combined or conspired.

If the plaintiffs have such too many defendants that does not prevent them from recovering of the defendants who are liable, the other defendants to have judgment against the plaintiffs. This is specifically covered by section 4265 of H. L. 1965, which is an follows:

"4986. JUDGMENT DETWEEN PARTIES AND ASIAINST SERVERAL DEPENDANTS—Judgment may be given for or against one or more of several defendants, sud,

when justice so requires, it shall determine the ultimate rights of the parties on each side as between themselves. When two or more are sued as joint defendants, and the plaintiff fails to prove a joint cause of action against all, judgment may be given against those as to whom the cause of action is proved." \* \* \*

The force of this and other statutes of the State of Minnesots, is to make the liberal rules of equity as to the rendering of judgments for and against any plaintiff and for or against any defendant, apply to actions at law.

Webmer v Young, 50 Minn. 21, 52 N. W. 330. Harper v Carrol, 66 Minn. 487, 69 N. W. 610, 1069. Howe v Spaulding, 50 Minn, 157, 52 N. W. 527.

In the first case above cited (Weisner v Young), the court

in the syllabus says as follows:

"The misjoinder of two parties as plaintiffs, when the cause of action is one alone, is no ground for a dismissoil of the complaint as to both. It is a mere irregularity which may be corrected at any time, before or after judgment, by striking out the name of the party improperly joined."

We also have a statute in Minnesota (enacted before any of the alleged wrongful acts of defendants were committed, chap. 303, laws of 1897. Sec. 4282 of R. L. 1905), as follows:

DESTRUCTION AND ACCAINST JOINT DESTRUCTION AND ACCAINST JOINT DESTRUCTION AND ACCAINST JOINT DESTRUCTION AND ACCAINST JOINT DESTRUCTION OF A PARTIE ACCOUNTY TO A PARTIE AND A PARTIE ACCOUNTY TO A PARTIE AND A PARTIE ACCOUNTY TO A PARTIE AND A PARTIE

In the case of Margan v Brach, 104 Minn. 247, 116 N. W. 486, our court directly passed upon the effect of this statute, and holds that although the allegations in the complaint may be of a joint liability, and the proof may be of a several liability, yet under this statute this is an immaterial variance. Of course it is likewise immaterial that some of the persons liability are not joined. In this case (Margan v Brach) the court says:

"But, if defendants contention be concoled, it is by no menns clear that there was either a failuse of proof or a fatal variance between the allegation of the complaint and the proof. Under our statates (section 4282, Rev. Laws 1995) all parties to a joint contract are jointly and severally tiable and may be saed jointly or severally at the election of the plaintiff. Hollister v U. S. Fidelity Co., 84 Minn. 251, 87 N. W. 776. In those states laving statutes like the one cited, it is generally held that there is no fatal variance where it is alleged that the contract was made with one and the proof shows that it was made with more than one (Hicks v Branton, 21 Ark. 186; Hapgood v Watson, 65 Me. 510; Scott v Shears, 63 Mass. 504), though the rule might be otherwise in the absence of a statute making all parties to the contract jointly and severally liable (22 Eneve. Pl. & Pr. 586.)"

Therefore, the circulation of these libels, slanders and threats, and the thereby intimidation and taking away of plaintiffs' customers, and the destruction of their interstate trade and commerce, makes all the defendants (and particularly the Creamery Package Manufacturing Company) liable to these plaintiffs under the Act.

The combination of the two defendant corporations—their concurrent action—in the prosecution of said two infringement suits against these plaintiffs, was in itself a combination and conspiracy in restraint of the interstate trade and commerce of these plaintiffs, and this without any reference to whether or not those two suits were prosecuted as a part of a greater illegal scheme and compiracy to get and maintain a monopoly. If this be not conceded as a matter of law, then it would be a question of fact for the jury.

In considering this proposition, we look at each defendant corporation as an independent corporation, but we must also ider that they hall, between themselves, from 85 per cent. 20 100 percent, of the churn business in several states. But we are now considering them as having this business lawfully and not as heving obtained it through any scheme prohibited by Act. They had nearly all the business when these platsappeared on the market with their churn. At that time, when these plaintiffs appeared on the market with a churchich weeket "satisfactorily" (page 507, middle of page), IT NEEDS NO ARGUMENT TO SHOW THAT THE COMBINATION OF THE OTHER TWO AGAINST THESE PEAINSTIFFS WADE IT A MUCH MORE SERIOUS MATTER FOR THESE PLAINTIFFS THAN IF EACH CORPOLATION HAD ACTED FOR PRELIF ALONE. This is what the United States Supreme Court meant when it said in the Northern Securities case:

"Men can often do by the COMBENATION of many what, severally, no one could accomplish, and even what, when done by one, would be innocent."

THERE IS A POTENCY IN NUMBERS WHEN COMBINED which the law cannot overlook, where injury is the consequence."

BUT IN THE PRESENT CASE WE OFFERED TO HOW THAT BY THIS VERY COMBINATION THE INTERSTATE BUSINESS OF PLAINTEFFS WAS DESTROYED, and this the court refused. On page 557 (middle of page) to offered to prove "that the interstate business of the plaintiffs was destroyed and taken away by the acts of the defendants, as set out in the complaint." This was objected to by defendants and argument was presented on the part of plaintiffs counsel in behalf of the offer, and during the course of the argument the counsel for plaintiffs arged as one reason for the admission of this evidence, as follows (page 559, beginning in teach line from top):

But we also contend that even if these two law suits were not a part of the compiracy, yet then the bringing of them in the way is which they were brought, was lilegal and wrong and prohibited by the Act, became there were two suits brought together, not each company acting independently of his own accord, but the two suits were brought together by the two companies, which shows the making of a combination and conspiracy prohibited by the statute. In other words, one may bring a law suit against another person to test a patent or to conduct litigation, but when two or more persons conspire together for a common purpose to drive another person out of business, we can recover damages from

them, because that is an act which is prohibited by the statute, regardless of any other combination or conspiracy whatever."

When we offered this evidence we had already proved that those two suits had been brought pursuant to an agreement to bring them, i, e, that there was a combination of the two defendant corporations to bring them, and the trial court held that the evidence adduced was sufficient to establish this combination and agreement to bring them (top of page 561).

Therefore, we have a case where we established on the trial that there was a combination or conspiracy to bring the two suits against these plaintiffs AND WE OFFERED TO SHOW THAT BY REASON OF THAT VERY COMBINATION the plaintiffs lost their business, which offer was refused by the court, on the ground, in the language of the court, that the damages "are not such damages as are contemplated by the Act" (near bottom of page 567). (All these claims and offers of proof are supported by allegations in the complaint, nor was there ever any objection or claim—to the contrary).

It certainly does not need any argument to show that where several persons or cornorations are engaged in any line of business, each having his legitimate portion, if they all combine but one and then all those in the combination go after the one, IT MAY BE a very serious matter for THAT ONE, who single handed and alone must fight the combined forces of all the others. 'This is what the Sherman Anti-Trust Act was aimed at where it says that "EVERY contract, combina-. . . . . or conspiracy" is illegal. And if our contention, as here made, be not true, then the Supreme Court of the United States will need to modify and change its decision in the Northern Securities case where it says that the Act (capitals ours) "does embrace and declare to be illegal EVERY CONTRACT, COMBINATION, OR CONSPIRACY, IN WHATEVER FORM, OF WHATEVER NATURE, AND WHOEVER MAY BE PARTIES TO IT," which directly or necessarily restrains interstate trade. We submit that if there is going to be any change from this position, if a court is going to say that SOME combinations which result in restraining interstate trade are exempt from this Act, then that At ought to be the United States Supreme Court, and not a trial court, to modify the Northern Securities decision, bast legal talent in the United States has been trying these

many years to concoct some form of combination to get around this Act, as evidenced by the Joint Traffic case and the Trans Mo. Freight case, but the Supreme Court of the United States says "EVERY COMBINATION" is prohibited. In the instant case the court below states that a "combination" has here been formed which gets away from this universal law, and that the United States Supreme Court decision must be modified and in fact reversed, or stand as so much sterile literature.

The force of this acting together or combining or "concerted action", as it is sometimes called, is recognized in the law in many ways. For instance the directors of a private corporation, or the officers of a public corporation, as a town board or city council, cannot enter into a contract, each director or officer acting separately or by himself. The advise and co-operation of a quorum must be had. The force and effect of this co-operation and assistance in the instant case is well illustrated by what took place between the attorneys after the two suits had been started against these plaintiffs, when a question arose as to whether their prosecution would be continued. The counsel for the complainants in those cases were unable to tell whether they would be continued till he had gone to Chicago to consult his "Chicago client in reference to the churn SUITS" (bottom of page 572), and after he arrived in Chicago he promptly wired back that he would "proceed with both SUITS" (page 573, ninth line from top). Here it was that by this combination, by concurrent action, the two defendant corporations decided to go ahead with both these infringement suits. Possible, if each corporation had acted alone and on its own responsibility, the suit brought by the Owatonna Manufacturing Company would have been then and there discontinued, and these plaintiffs saved the great expense they were uselessly put to in that case; for at the time of those communications between the attorneys facts and circumstances had been brought home to the attorneys for the Owatonna Manufacturing Company which made a dismissal of that case the proper thing to do (page 540). The trial court held that AS A MATTER OF LAW, had there not been any combination of the two defendant corporations in the prosecution of the two patent suits, YET THAT BOTH SAID SUITS WOULD NEVERTHELESS HAVE BEEN PROSECUTED, AND WITH LIKE EFFECT AND EXPENSE TO THESE PLAIN-TIFFS.

If the purpose of the combination in the prosecution of those two suits was to crush these plaintiffs by their joint cution, and by in this way driving these plaintiffs out of en by making the litigation so expensive to them that ald have to quit, then they would doubtless have never n brought had it not been for the combination. In such a it is immaterial what would have happened or not hap ed to plaintiffs had there not been this combination, FOR THE COMBINATION WAS THE CAUSE. When a thing is accomplished by unlawful meens, it is hardly an excuse to my that the use thing would probably have happened in any event had the unlawful means not been used. That to crush these plaintiffs by the combined force of the two suits was the very purpose of the two defendant corporations in bringing them together is shown by the testimony of Mr. Cord King. He taked Mr. Howe, the manager and a director (page 322) of the defendant Owatonna Manufacturing Company, how he expected to come out with the said two suits against these plaintiffs, and Mr. Howe replied (page 325, middle of page);

"IT DON'T MAKE ANY DIFFERENCE HOW WE COME OUT; WHEN WE GET THROUGH WITH MR. VIRTUE HE WILL NOT HAVE MON-EY ENOUGH LEFT TO BUILD A CHURN."

On the part of the defendant it was "Heads I win; tails you lose." And this is the feature of the situation which was brought about BY THE COMBINATION OF THE DEFENDANT CORPORATIONS, BY THEIR CONCURRENT ACTION.

(This testimony of Mr. Cord King was ruled out by the court, but we alloge and ruly on this as one of the errors).

When we consider that the Gwatonna Manufacturing Company acree had any cause of action against these plaintiffs (as the equity court held and as we offered to prove on the trial of this action), and when we consider that the Creamory Package Manufacturing Company sover owned any patent sued on by it (it having the same through illegal agreements it at all, as we proved on the trial), and that these plaintiffs never infringed say such patent (as we offered to prove on the trial of this action, and which the court refused), it is more plainly some that the two defendant corporations needed just this neathernee, co-operation, mutual advice and encouragement, between themselves, to go ahead with those suits.

We admit that each person or corporation owning a patent has a right to prosecute a suit against an alleged infringer. We dany that any two or more can combine the field against a remaining one and thus drive him out of business, and when such a combination is established in court it is for the jury to state the consequence, as well as the purpose. In the case of har the trial court took upon himself to state both, as a matter of law.

When the two defendant corporations combined and prosecuted their suits they well understood the force of the longuage used by the United States Supreme Court in the Northern Securities case which we have just quoted. We think that. If the trial court could have seen and realized these things as well as the defendants, this appeal would not have been accentary. In fact in these trust cases there have been to date many kinds of combinations, always with the same deadly offect, but when the matter is brought into court, the trial court has been unable in most cases to see it. There is on the other hand hardly a business man in the country who does not realize and at once appreciate such a situation without mental effort. And it is difficult for a business man to understand why a court cannot see through those things. He is inclined to the view that it must be due to some intricate proposition of law. But it is not a question of law at all, but a question of fact, where interstate trade and commerce are involved.

It is difficult for us to see what kind of a combination could have been more disastrons to the business of these plaintiffs than the prosecution of said two suits by the concurrent action of the defendants. We allege in the complaint that it took all the money, time and attention of the plaintiffs herein and ruined their business. If there was this combination in the prosecution of the two suits, and if the same resulted in the destruction of plaintiffs' business, we fail to see why it is not a combination in restraint of interstate trade and commerce within the meaning of the Sherman Anti-Trust Act.

We offered to show on this trial that the plaintiffs were never infringers of any patent of any defendant. Therefore, as this case stands, the temporary injunction or interlocutory decree obtained by the Creamery Package Manufacturing Company against these plaintiffs was wrongfully obtained by that company,—something it had no lawful right to. Possibly a jury might determine that such wrongful result WAS

EROUGHT ABOUT BY THE COMBINED ACTION OF THE DEPENDANTS, BY THE ONE HELPING THE OTHER. For instance, note the attempt of the defendant La Bare President of the Owatoran Manufacturing Company) to get the witness L. A. Disbrow to make a trip to Mankato to meet his brother, Henden B. Disbrow ( a witness for defendants in the two faits) for the purpose of keeping said witness away from said defendants, to get the witness of those defendants out of their reach and to get him at least to go and see Mr. Paul, the attorney for the CREAMERY PACKAGE MANUFACTURING COMPANY before using Mr. Virtue. (Page 485, middle of page). Here the defendant Owatoran Manufacturing Company, through its president, was aiding the Creamery Package Manufacturing Company to "queet" a witness of the defendants in those saits. (This testimony was struck out by the court below as not amounting to anything, but we urge such striking out as one error).

But these defendants never infringed any patent claimed by any one of the defendants. Therefore, necessarily, when se defendants drove these plaintlifts out of business THE EENDANTS DID MUCH MORE THAN THEY WERE ENTITLED TO DO BY VIBTUE OF THEIR PATENTS, as cuming for the moment that they had whatever patents they nimed. THE HAPATENTS IN SUCH EVENT COVERED NET A PART OF THE FIELD OR INDUSTRY, and even If they were entitled to everything covered by their patents. THEY WERE NOT ENTITLED TO A MONOPOLY IN SUCH PART OF THE FIELD OR INDUSTRY AS WAS NOT COVERED BY THEIR PATENTS BUT WHICH WAS IN THE RIGHTERL POSSESSION OF THESE PLAIN. TIPES UNDER THEIR PATENTS. THE LAW SUIT METHOD WAS ONE OF THE THINGS THAT GAVE TO DEFENDANTS, as we offered to show on the trial, their mo-sopply, both within the scope of their elaimed patents AND WITHOUT THE SCOPE OF THEIR CLAIMED PATENTS. It is a case where three parties were in the field, the two de-dendants rightfully (we assume here for argument) in exclue pomeration of a portion of the field under their patents, and a minimize tightfully in possession of a partion of the field der their patents, and neither one infringing upon the rights on other; then the two defendants by combination secured ever NOT ONLY THAT WHICH BELONGED TO

THEM UNDER THEIR PATENTS BUT ALSO WHICH DID NOT BELONG TO THEN BY VIRTUE OF ANY PATENT, BECAUSE IT WAS OUTSIDE THE SCOPE OF THEIR PATENTS AND WAS CONTROLLED BY THE PATENTS OF THESE PLAINTING FOR THIS WAS NOT ONLY A SUCCESSEUL ATTEMPT OF THE DESCRIBANTS TO KEEP FOR THEMSELVES BY UNLAWFUL COMBI NATION THAT WHICH THEY WERE ENTITLED TO UN-DER THEIR COMBINED PATIENTS BET IT WAS A SUC-CHESSIOUR ATTEMPT ON THEIR PARA TO DET THAT PORTION OF THE INTERSTATE TRADE AND COM-MSRCE OVER WHICH THEY HAD RIGHTFULLY NO CONTROL BY VIRTUE OF ANY PATENT AND WHICH BIGHTPULLY BELONGED TO THERE PLAINTIPPS. IT WAS NOT SOMETHING DONE TO PROTECT THEIR PROPERTY " IT WAS SOMETHING DONE TO "APPRO-PRIATE THE PROPERTY OF ANOTHER!

But the trial court says there was no showing that they did anything to drive these plaintiffs out of business. This was plain error. And also WE OFFERED TO SHOW, and allege in the complaint, THAT THAT WAS WHAT THEY DIRECTLY AND NECESSARILY DID, and we are within the rule laid down by the United States Supreme Court in Addyston Pipe & Steel Co. v United States (175 U. S. 211, 44 L. ed. 136, 26 Sup. Crt. Rep. 96), wherein that court stated, as follows:

"TT IS USELESS FOR THE DEFENDANTS TO SAY THEY DID NOT INTEND TO REGULATE OF AFFECT INTERSTATE COMMERCE. THEY INTENDED TO MAKE THE VERY COMBINATION AND AGREEMENT WHICH THEY IN FACT DID MAKE, AND THEY MUST BE HELD TO HAVE INTENDED (IF IN SUCH CASE INTENTION IS OF THE LEAST IMPORTANCE) THE NECESSARY AND DIRECT RESULT OF THEIR AGREEMENT."

The trial court entirely ignored the principle here an-

D.

But it is only when we consider all the acts of defendants from the beginning to the end that we realize the full force and effect, and the proper place and scope, of the libels, slanders and threats of the defendants, and of thier joint prosecution of the two infringement suits. There is no room for controversy that in about 1897 the two defendant corporations started upon their scheme to get control of the churn business of the country, and as a part of the same scheme the defendant Creamery Package Manufacturing Company sought to control the entire dairy and creamery supply business. At the beginning there were others in the field who had to be disposed of in order to "eliminate competition" At the beginning the Gwatonan Mannfacturing Company had certain patent suits pending, the object and purpose of which was to get this same monopoly BY MEANS OF THOSE SUITS, but this without success. The combination method was then restored to. When we find the churn business of the country divided up among several concerns, and afterwards find a course of procedure like we have in this instance, with the result that all the business gets under the control of two corporations, who handle their affairs 80 THAT THERE WILL BE NO COMPETITION BETWEEN THEM. we are justified in coming to this conclusion. In addition to this fact of the monopoly having been secured by the combination method, we have also the car marks usual in a scheme of this sort. There is the use of the various fictitious names, so as to make a show of apparent competition; there is the conceeling of the facts; there is the fraudulent putting in of bids, where competitive bids are required; there is the speedy and material rise in prices, without occasion or excuse; there is the dividing up of the business between themselves, 45 per cent, to one and 55 per cent, to the other, and many other things already narrated.

Now, we say, that everything the defendants did, from the time they started upon their unlawful conspiracy, until the present time, which was caused by or had its incentive in this unlawful scheme, or which was connected directly with the motives of such unlawful scheme, was an unlawful overt act on the part of the combination and whoever was damaged thereby is entitled to maintain an action of this kind. This rule is laid down well in the Loewe v Lawlor case, as follows:

"We have given the declaration in full in the margin, and it appears therefrom that it is charged that defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was interestate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants, and that thereby they injured plaintiffs' property and business."

It is also well covered in the CCA case (reversing the trial court), of People's Tobacco Co. v American Tobacco Co. (170 F. 396) as follows:

The seventh section is to the effect that those who do orbidden things, commit the misdemeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property. It follows therefore that the petition should charge, and that is all that is required: (1) That the defendants have done one or more of the forbidden things; (2) That by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averements, it is not subject to an exception of no cause of action, although it may contain surplusage and may specify some items of damages which may not be recoverable."

The Supreme Court of the United States has gone to the full extent of the above text, in City of Atlanta case, where it says as follows:

"Finally, the fact that the sale was not so connected in its terms with the unlawful combination as to be unlawful (Connolly v Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Crt. Rep. 431) in no way contradicts the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong."

Also the precise position that ANY ACT, NO MATTER WHAT SUCH ACT BE, may be a part of an illegal scheme and thus give rise to an action for damages, is expressly and precisely held by the U. S. Supreme Court in the case of Loeve v Lawlor (supra) and in the case of Aikens v Wisconsin (supra) in each of which two cases the United States Supreme Court uses the following language:

"The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts. The very plot is an act in it-

self. Mulcahy v Queen, L. R. 3 H. L. 306, 317. But an act which, in itself, is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated cause temporary damage, the power punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot of law."

Also the same effect is the Swift & Co. v United States case, in which the United States Supreme Court says:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomptish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

In all these cases the fact that the act in itself was not wrong is absolutely no defense.

We are unable to see why the prosecution of the two infringement suits just as well as the circulation of libels, may not be illegal from this point of view,—as a part and parcel of an illegal scheme, or as something which originated in the motives which brought about and were the cause of such illegal scheme.

We have already (at pages 27 to 30 of this brief) set forth several reasons why the prosecution of these infringement suits was in fact a part of the illegal scheme. It seems to us beyond question that those things present in this case an issue of fact for the jury.

To the many reasons there given we must add another important one, necessarily arising out of the nature of a combination or monopoly in letters patent, as follows: When persons attempt to get a monopoly of an industry covered by patents, the first step of course is to secure the letters patent which control such industry. But the bare having of such letters patent will not accomplish the desired result. The next step is to have some court carry out and perfect the combination and conspiracy, give it force and effect, by entertaining infringement suits against alleged infringers under those same letters patent. Those are the two necessary steps. other words, in every such scheme, the accumulation of the letters patent is the first step, and the second step is the bringing of the necessary infringement suits to get rid of all other persons. If the scheme is thwarted in either of these two things (either failure to get all the letters patent or the court refuses to sanction the illegal scheme) then the scheme must fail. It is just as important to the schemer to be able to maintain the patent infringement suits as it is to him that he collect the necessary patents. The letters patent confer no privilege upon the holder to manufacture or sell which such person did not have prior to the issuance of the letters patent; such letters patent simply give to the holder a right to exclude all others from that particular field. This is elementary in patent law and needs no citation of authorities. Therefore, letters patent are simply something which give to the holder a good title to a patent infringement suit to drive others out of the industry covered by such letters patent. The direct and only object of the collecting together of all the patents covering any industry is to enable the collector to bring and maintain all the necessary infringement suits to keep all other people out. The only way to do this is by infringement suits, if anybody attempts to come in.

Only by ignoring the undisputed facts in this case can anyone say that there is no evidence going to show that the two patent suits against these plaintiffs were prosecuted by the defendants to drive these plaintiffs out of business, or as a part of their plan to secure a monopoly. For, we have shown that the defendants had a monopoly of the business when plaintiffs appeared with their churn; we have shown that they

secured that monopoly by buying up or getting control of all the patents. After they collected all their patents, they divided up between themselves the business of manufacturing churns and arranged it so that there would be no competition between these two corporations in the United States holding see two important and different sets of patents; and we have w considered the necessary nature of a patent.

But we go much further than this Through the testimany of the witness Frink we look down into the minds, in 1897 1898, of these persons who collected those patents, and we have it brought directly to us from an eye witness and a perof intent was in the making of such collection. We see by the testimony of this witness that the object and motive was to get such letters patent that the combination could drive everybody class out of business. The witness Frink says:

I didn't quite understand what you said with regard to any discussion at these meetings before the making of the agreement of February 24, 1898, in regard to the control of prices as affecting other articles. If I understood you correctly there was some argument at one of those meetings that if you had the control of the churn patenta, then no one eise could come into Minnesota or into North or South Dakota or Wisconsin; and I think at one time you said that if there was any raise in the price of the patented articles that still inventors would be ahead.

A. I said that, but not with reference so much to combined churus as with reference to other articles. We argued at this meeting that the patents already on combined churus would cover the entire Selon

That is where I want to ask you some ques-That is where I want to the you some ques-tions. You thought at that time, that these Victor patents, and so argued, that the Victor patent and the Disbrow patent, and the other patents that were controlled and a ward by those various concerns in the pusiness covered the whole field in making charms, so there couldn't be any other charm made? A. You, sir, we ind a long argument upon that question. We considered that the patent held by

the Cornish, Curtis & Greene Mig. On, by Harber and Fargo, and those held by the Owatonne Manufacturing Company, which held the Disbrow, if we were to put them all together in one firm, we thought that we would control the world. We thought that the patents were so broad. We had a very long and spirited argument upon what they did include, and if they did cover all the business." (page 311)

"A. It was argued that if we made the Victor and the Disbrow, we could lay all the rest of the patents on the shelf, and drive everybody else out of the business with these two machines." (middle of page 312)

"A. I meant that the patents which were then controlled or would be controlled, or that they could get hold of, or had in their hands at that time, or would have in the future. They said they had some patents that were in course of construction by Mr. Penn and Mr. Brown, and they named some others that were developing, that they would shelve, meaning that they would leave the Disbrow as it was, and the Victor as it was at that time. Those who (were) considered by those present to be the two best ones and they would shelve all the rest of them.

Re-cross examination by Mr. Cohen.

Q. When you spoke about shelving, you meant that those patents were not to be used, is that right?

A. Not to be used or sold. There is no difference between using and selling, they were not to be

Q. If these people made that arrangement between them, they would go on and sell the Victorand the Disbrow churns.

A. Yes, sir.

Q. And they were not going to manufacture the others?

A. Yes, nir.

Q. Was that their idea?

A. Yes, sir, that was their idea at that time."

(Last half of page 220).
Also just prior to the bringing of these two infringement tuits against these plaintiffs, and after the plaintiffs herein had placed their churn on the market, the Minnespolis manager of the defendant Creamery Package Manufacturing Com-puny came to Owatonus, and this is what the plaintiff Virtue mays of what was then done (first half of page 519):

Q. Give the conversation as near as you can.

A. He (manager of the Creamery Package Manufacturing Company) said he would make a contract with us to handle their specialists, and he also wanted us to agree to handle the creamery supplies that we were handling at that time through the Creamery Package Manufacturing Company. He says to me "You are making a churn, but you had better take the Dishrow churn and make this contract with us" . . . . . I told him that contract required us to sell to creameries at a price that would be more than we were charging them at the present time, and that the price we would have to pay with the discount of, or what we would have to sell them for, was more than we were selling the goods to the creameries at the present time, and that they would have to pay more; he said that they would have to pay, that they couldn't get them anywhere clee.

Q. Who would have to pay?

The creameries.

Q. And they would have to pay it to whom?

A. Pay it to us, He says "We think we own the creamery supply hasiness around here."

. But these plaintiffs refused to go into this combine in any way. (Mr. Virtue had formerly made one contract with the Creamery Package Manufacturing Company which that concern procured of him, and never carried out or intended to carry out, as we offered to show. The court ruled this out, but we allege this as america. Virtue had had enough of such contracts).

Assuming now, after the above happened that at the time of the commencement of said two infringement suits, the de-fendants wished to continue their said monopoly which they had theretofore enjoyed and after the plaintiffs had refused to go into my kind of a contract with them, will some one kindly suggest how they could maintain their said monopoly EXCEPT BY BRINGING THE INFRINGEMENT SUITS THEY DID BRING AGAINST TRESE PLAINTIFFS. The only other way they could do it was by the libel, slander and threat method, or by fair competition in the open market. The former method they in fact used. But the latter method,—that of fair competition—was something which the defendants abborred. They had tried that in former years, and it was not to their taste. It was in fact the very thing they dreaded; which they considered fatal to their tremendous success. It was in fact not on their program and had not been for these many years. Fair competition was to them a night mare and to be avoided at all cost. Also is there any one who can say that, had the two defendant corporations made use of the fair competition method (and omitted their threats, libels, slanders and latimidations), they could have likewise maintained their mid monopoly? Auyhow, there is nothing in the evidence showing that they could. But it is immaterial whether they could r could not. What they in fact did is what we are complaing about.

We say that the bringing of those two infringement suits fits right into the scheme and did in fact play an important part in the maintenance on the part of the defendants of their mid monopoly. And this we offered to show on the trial when we offered to show (page 557) that the plaintiffs were driven out of business by the prosecution of those suits, which the court refused to permit.

It has been urged that a patentie is entitled to bring a suit against an infringer to "protect his property," his property being the patent. We admit that the owner of a patent is entitled to bring such a suit against an alleged infringer. We deny that any such patentee has a right to bring any suit when the bringing of that suit is a step in the promotion or carrying out of a monopoly prohibited by the Sherman Anti-Trust Act. The latter is a suit not only to "protect his property" but is maction to "perfect a monopoly." The United States Supreme Court held in the Continental Wall Paper Company case (supen) that a corporation which sells wall paper pursuant to the terms of its filegal scheme and monopoly cannot recover the purchase price from the person to whom it was sold, no mate ter how many thousands of dollars worth of paper was at fastic.

Is the right of a putantee necessarily any greater than the right of the seller of one million dollars worth of goods to recover his property?

whether or not the prosecution of a patent sait in any particular instance is a part of an illegal scheme of minopoly any sometimes be a distouit question to determine. But where representation is engaged in that very thing, and there is much redence tending to show that the infringement suit was prosected as a part of the filegal scheme, then it is fur the jury and whether or not it was in fact a step in such unlawful cheme. If a corporation has by its conduct made that issue accessive, it cannot object to the issue being determined by the enthority provided by our laws. The way for a corporation to avoid the pary in such cases is for it to keep out of such unlawful schemes. If the corporation goes into such a scheme and gets the facts mixed, it seems to us that such corporation must stand the consequences. Indeed we believe in this case that the defendant corporations have mixed things for the very purpose of obscuring the real-facts; and of course in this view, the more they have mixed things the better they thought they were. The only way to salve their riddles is to submit the They hoped to put a face on the situation which would make it appear lewful; we have disclosed the entire scheme and motive back of such appearance. If the detendants have placed themselves in such a position that they cannot bring any suit TO PROTECT THEIR PATENTS with making met action at the same time a proceeding to PER FECT THEIR ILLEGAL MONOPOLY, then they have themselves alone to blame for it. These plaintiffs cannot be deprived of their lawful rights under the Sherman Anti-Trust Act to recover the enormous damages they have sustained by the criminal conduct of defendants simply because the defendants had placed themselves in such a position that they could not protect their patents without at the same time making the suit which provested their patents a step in the proceeding to perfect their manapoly. Certainly a corporation cannot maintain an in-fringement suit when the very act of prosecuting the suit is s ust of the criminal plot.

If the defendents in 1897 or 1898 collected all the patents to "control the world" and to get and maintain a monopoly in the cause business in the United States, so testified by Mr. Prints then ther intended to do in the future—from that time

entering and everything that was necessary to keep and etain such monopoly, and to prosecute such infringement suits as were necessary to drive everybody else out of business; they purposed to meet the varying exigencies as they should arise. Any other conduct on their part would be inconsistent with their object and purpose in making the collection of the patents—unless they repented and surrendered and gave up their nonepoly, but there is no showing in this record that the defendants ever repented of anything or that they ever gave up anything. The history of monopolies in the United States would hardly warrant a presumption that a corporation, after acquiring and enjoying such a graft, would voluntarily give ap and recant. Also, we have already in the former pages of this brief called the attention of the court to the fact that in the various contracts between the two defendant corporations and in the contracts between them and other corporations and persons which led to this monopoly) there were specific provisions made for the bringing of intringement suits, and the de-fendant Creamery Package Manufacturing Company was given standing and say in the prosecution of infringement suits in the name of the defendant Owatonna Manufacturing Company. This is conclusive that when those contracts were made it was a part of the scheme to make use of lawsuits, and the reason for giving the Creamery Package Mfg. Company a voice in the was to place it in the power of the Creamery Package Manuacturing Company to in that manner control the same and seep its monopoly. Now, those contracts are still in force, and the two infringement sults against these plaintiffs were prosented by the defendant corporations right in line with the provisions of the same. The amount of say the Creamery Package Manufacturing Company had in the Owatonna Manufacture ing sait is shown by the trip of the attorney Paul to Chicago, to consult with his Chicago client in regard to the two suita." This is further evidence that in the prosecution of those two suits the defendants were carrying out and operating under those contracts made back in 1897 and 1898. There is also a provision in the contract of February 24 1898 concerning the commencing and disposition of litigation (first half of page 52). All this shows conclusively that when the defendants started ut with a plan to get their said monopoly and to restrain in erstate trade and commerce, they fully canvassed and made provision for the law-suit method as an important and powerful sool in their hands to accomplish such result.

For these reasons we contend the trial court erred in each particular as set forth in the first six assignments of error. Assignments 4 and 5 go to the extent, nature and character of the basiness of these plaintiffs,—assignment 4 to show that the churus of plaintiffs did good work and assignment 5 to show the extent of their business.

#### Division 2.

#### (Assignments of Error 7, 8, 9)

In the testimony ruled out, to which these assignments of error apply, we offered to show (at pages 242-246 of the record) the facts and circumstances connected with the making of the contract Exhibit C (page 101) between the plaintiff Virtue and his co-patentee and the Creamery Package Manufacturing Company, which facts and circumstances were that in and by acid Exhibit C the Creamery Package Manufacturing Company (acting in its own name and also through the fictitious name of Cornish, Curtis & Greene Manufacturing Company) procurred from Mr. Virtue and his co-patentee the exclusive right to manufacture churns under their patent described in said contruct Exhibit C for the period of three years, beginning January 22 1900; that they never intended to fulfill that contract when they procurred it from Mr. Virtue, but simply procurred the same for the purpose of keeping the churus covered by said patent off the market and this all for the purpose of preventing my competition which said churn could otherwise cause to them d to continue in their power their said monopoly.

We have already given the authorities in "Proposition 10" of this brief to the effect that all steps and proceedings by which monopoly is formed and all material facts and circumstances may be shown bearing upon the question of monopoly and restraint of trade. In a great many cases a monopoly can only be shown by circumstantial evidence; and in all cases the full nature of the monopoly, and how it operates in restraint of trade, can only be shown by such facts and circumstances although other evidence may establish the monopoly itself. These introducing facts and circumstances are alyaws admiss fole in evidence when any question or proposition is a subject of hit pation and inquiry in a court, and they are always of the greatest importance in throwing light; upon the controlling same in this case this contract fathibt C, and the circumstances of

is procurement, and violation by the monopoly, sheds light on their attitude toward Mr. Virtue and the patents under his con trol; it was one of the steps by which they retained their monopoly. It shows that they were scheming back the get him out of the way and to take care of his patents and put his patent "on the shelf". A series of acts like this contract episode may effectually be an unfailing pointer to the true attantion. It is evidence to show that they were designing to keep him out of business, the same determination which controlled the action of the defendants when in one year and six months after the termination of said contract Exhibit C, they tried to get him into another contract and upon his refusalto go in they brought their two equity suits against him which necessarily and directly drove him and his company out of business. This court has had enough of these trust cases before it, we believe, to see at a glance how necessary it is to throw all possible light in the whole history of the concern, and for that reason we will submit this proposition to the court without further discussion,

The case of Waters-Pierce Oil Co. v Texas, (Texas) 166 8. W. 918, is an illustration of what a court is authorized to do an circumstantial evidence. This was affirmed by the United States Supreme Court in 177 U. S. 28, 44 L. ed. 657, 29 Sup.

Ct. Rep. 220.

#### Division 3.

# Assignments of Error 10, 11, 12, 13, 14, 15)

We think it is correct to say that the court refused to permit any statement made by any of the alleged conspirators to be received as evidence against an alleged co-conspirator. It is true that the court did permit certain conversations to be received in evidence, but it will be found in each such case that the conversation was received as a part of a business transaction and not on the ground of the admissibility of it as a statement of an alleged co-conspirator. The rule is well settled that this is reversable error, as shown by the authorities in "Proposition 17."

These statements ruled out, to which these assignments of error apply, were statements made by T. J. Howe, Frank La Bare and C. P. Cooper, and the substance of the statement in each case, and its bearing upon the case, is disclosed in the saignment of error and the testimony to which it applies. It was shown that Frank La Bare was the President and a Director of the Owatonna Manufacturing Company (p. 322), and he

was the person who signed and variated the bill of complaint in the equity infringement suit brought by that company against these plaintiffs (p. 109). Mr. T. J. Howe was the Manager and a Director of the same company (p. 322). It was also shown that Mr. Howe had signed many of the contracts which have been mentioned between the Creamery Package Manufacturing Company and the Owntoana Manufacturing Company and those by which the Disbrow Manufacturing Company was closed out, and that Mr. La Bare also signed a portion of the same (pages 75, 76, 81, 82, 85, 86, 87, 89, 95). Mr. Cooper was the Manager of the Creamery Package Manufacturing Company at Minneapolis and was concerned in the business of that company in buying out and putting out of business the E. W. Ward Company of that place (p. 334).

That these conversations were very material is shown by reference to one of them, what we offered to prove in the evidence referred to by assignment of error No. 11, which was that mid Mr. Howe stated, in reference to the plaintiff Virtue, when he was asted by the witness King how he, Mr. Howe, exceed to come out with the two infringement suits brought system these plaintiffs, to which Mr. Howe replied; "It don't make any difference how we come out; when we get through with Mr. Virtue he will not have maney enough left to build a charat."

This discloses the scheme exactly.

#### Division 4.

(Assignments of Error 16, 17, 18, 19, 20, 21)

These assignments of error relate to the excitision by the trial court, as to the two defendant corporations, of statements scade by the defendant La Bare. The court held that such statements were not binding on either one of the two defendant corporations. The assignments of error likewise show the sature of this evidence and its materiality. We specifically refer here to only one or two of them. The testimony in reference to assignment of error No. 16, at the middle of page 549, shows the defendant La Bare stated, "just before" (second line from actions of page 548) the bringing of said two patent infringement quits, to a drayman at Owatouna, that he, said drawman, "wouldn't have many more churns to hard for them. (these plaintiffs), that they (Mr. La Bare and his crowd) were about pady to close in on him. (Mr. Virtue) and put them (these

plaintiffs) out of business' (two thirds of way down from top of page 546;

When this testimony was effered it had been shown by the evidence that defendant La Bare was the President and a Director of the defendant. Owatoma Manufacturing Company (522); that he had been trying to get at least one of the witnesses of these plaintiffs in those suits out of the way (p. 435) and that he was present at the taking of the evidence in those two parents suits and was evidently in consultation with officers of the defendant Creamery Package Manufacturing Company and the attorney Paul at such times (p. 543-544); that he signed and verified the bill of complaint in the equity suit brought by the Owatoma Manufacturing Company against Virtue (p. 109) and that he signed some of the contracts by which the monopoly was secured to the defendant corporations (p. 82, 86, 87, 89).

In assignment No. 21 we set out the testimony which was struck out by the court, not only as not amounting to anything, but also as not binding upon the two defendant corporations. This, in addition to being error in that it was evidence against the two corporations, is also error on the ground that such evidence was very material, in showing the attitude and active part taken by the defendant La Bare in the conduct of the two infringement suits,—his scheme and efforts to get one witness of the defendants in the emity suits out of their reach.

## Division 5.

# (Assignment of Error 22, 28, 24).

These are that the court refused to permit us to prove that neither one of the plaintiffs ever infringed any letters patent seemed or claimed by either one of the defendant corporations.

We arge this as palpable error.

The two defendant corporations in 1897 and 1896. I collected all the patents which they thought "would cover the entire field" (311) and "would control the world" (311); they thereby did in fact acquire a monopoly which continued until these plaintiffs appeared with their churn. Then the defendants brought their two suits (they acting and conspiring together), and drove these plaintiffs out of business, so that the defendants still retained and maintained their monopoly. If the plaintiffs in this action were not infringers, then certainly (although each defendant corporation, acting by itself alone, had a lawful right to bring an action in good faith on a patent which it owned to test such patent, even though such a suit might result in a mo-

nopoly to such defendant under its patent,— a lawful monopoly) the defendants had no right to combine and conspire together and bring two suits in equity as a part of their scheme, for the purpose of retaining their monopoly and thereby drive these plaintiffs out by force of numbers rather than by the merits of the suits,—by might rather than by right. A jury can say, under the evidence in this case, AND MUST HAVE SAID IF THIS EXCLUDED EVIDENCE HAD BEEN RECEIVED, that these plaintiffs were driven out BY THE COMBINATION,—by the might and not by any right. It was not the excluding of these plaintiffs from trespassing apon any rights owned by these defendants, but it was the killing off of these plaintiffs by force, these plaintiffs having at all times the lawful right to remain in business.

Whatever might be said about the right of a number of different patentees to combine together, contrary to the terms of the Sherman Anti-Trust Act, on the ground that such Act does not apply to patentees (an untenable position, we contend), and thereby drive an infringer out of business, IT. CERTAINLY CANNOT RE THE LAW THAT A NUMBER OF DIFFERENT PATENTEES CAN COMBINE AND CONSPIRE TOGETHER AND THEREBY DRIVE ANOTHER PERSON OUT OF BUSINESS WHO HAS NOT INFRINGED ANY OF THEIR RIGHTS, BUT WHO IS TOTALLY OUTSIDE OF ANY RIGHTS OF SUCH DIFFERENT PATENTEES UNDER THEIR PAENTS.

The question whether or not these plaintiffs, were infringers might have a bearing upon the amount of their damages; for an infringer might not be entitled to as great damages as one who did not infringe; and one who infringed in only a slight degree or trivial matter (which could be easily corrected without injuring his machine) would be in a different position perhaps from one who could not manufacture without infringing.

#### Division 6.

(Assignments of Error 25 and 26).

We offered to prove on the trial the fact that the letters patent sued on in the Owntonna Manufacturing Company suit were absolutely void; that the alleged inventors thereof were not the real inventors, to the knowledge of defendants,

We consider this very material on the proposition that

spiracy, as alleged in the complaint. It also poes to the motives of the defendants, and their willingness and purpose to injure these plaintiffs and drive these plaintiffs out of business, without any regard to the methods used.

It also is a complete answer to any ciaim on the part of defendants that the combination here in question is a combination of different patentees and thereby escapes the provisions of the Sherman Anti-Trust Act.

# Division 7. (Assignment of Error 27)

No exception was taken on the trial of the above entitled action to some of the rulings of the court rejecting testimony, which rulings are assigned as errors on this appeal. Those assignments of error, where exceptions were not taken on the trial, are the following: Numbers 4, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20.

There were 26 assignments of error urged on the motion for a new trial, and the 27th assignment of error (here under discussion on this appeal) was that the Circuit Court erred in refusing to grant a new trial.

Under Section 4200 of Revised Laws of Minnesota of 1905, it was not necessary to take an exception on the trial, in order to raise the question on a motion for a new trial if the alleged errors be clearly specified in the notice of motion for a new trial. All these alleged errors of the Circuit Court, whether excepted to or not on the trial, were clearly specified in the notice of motion for a new trial (pages 579-585), and it therefore became the duty of the Circuit Court, under the conformity statute, to grant a new trial for those errors, if they were errors on which a new trial should have been granted without the taking of any exception thereto on the trial. Said section 4200 is as follows:

"Exceptions—Notice of motion for new trial—A party may except orally at the trial to any ruling or decision of the court on a matter of law. No particular form of exception is required. A minute of the exception shall be made by the judge or stenographer, and the same may be preserved either in a bill of exceptions or a settled case; Provided, that in order to obtain a review of any ruling, order, decision, or instruction made or given by the court it shall not be necessary to take an exception thereto, but in lieu of an exception the aggrieved party

shall clearly specify the alleged error in his notice of motion for a new trial or other relief therefrom."

We raise this question here, on this appeal, under this assignment of error 27, that the Circuit Court erred in refusing to grant a new trial.

#### IN CONCLUSION.

THE CLAIM OF THESE APPELLANTS, THEN, IS, THAT THERE HAS BEEN AN UNLAWFUL CONSPIRACY AND COMBINATION ON THE PART OF DEFENDANTS UNDER SECTION 1 OF THE SHERMAN ANTI TRUST ACT AND THAT THEY HAVE ALSO SECURED AN UNLAWFUL MONOPOLY PROHIBITED BY THE TERMS OF SECTION 2 OF SAID ACT (IN OTHER WORDS, THAT THEY HAVE VIOLATED BOTH SECTIONS OF SAID ACT), AND THAT BY AND THROUGH THEIR OVERT ACTS IN POING AND ACCOMPLISHING THOSE ILLEGAL ENDS THEY HAVE DRIVEN THESE PLAINTIFFS OUT OF BUSINESS AND DESTROYED THE PLAINTIFFS INTERSTATE TRADE AND COMMERCE, TO THE DAMAGE OF PLAINTIFFS IN THE SUMS AND AMOUNTS STATED IN THE COMPLAINT.

THIS IN FACT COVERS THE WHOLE ISSUE, AND IT WAS SO DIRECTLY AND EXPLICITLY HELD IN TWO CASES DERETOFORE DECIDED; ONE IS THE CASE OF LOEWE VS LAWLOR (SUPRA) (U. S. SUPREME COURT) IN WHICH THE COURT SAID:

We have given the declaration in full in the margin, and it appears therefrom. That it is charged that defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants; and that thereby they injured plaintiff's property and business.

AND THE OTHER CASE IS THAT OF PEOPLE'S TO HACCO COMPANY US AMERICAN TOBACCO COMPANY (SUPRA) (CCA. MAY 1909) (170 F. 896) WHERE THE COURT SAYS ON PAGE 407 AS FOLLOWS:

The seventh section is to the effect that those who do the forbidden things, commit the misdemeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property. It follows therefore that the petition should charge, and that is all that is required: (1) That the defectants have done one or more of the forbidden things; (2) that by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averements, it is not subject to an exception of no cause of action, although it may contain surplusage and may specify some items of damages which may not be recoverable.

OF COURSE IT IS ONLY OVERT ACTS, THE DOING OF THINGS, (OTHER THAN A MERE MENTAL CONCEP-TION), WHICH CAN PUT AN INTERSTATE TRADER OUT OF BUSINESS, AND BY WHICH THESE PLAIN-TIPFS WERE IN FACT PUT OUT OF BUSINESS BY DE-FENDANTS. THOSE OVERT ACTS AND THINGS DONE WHICH HAVE SUCH RESULT ARE NECESSARILY PRO-HIBITED BY THE TERMS OF THE SHERMAN ANTI TRUST ACT. IT IS ABSOLUTELY IMMATERIAL HOW INNOCENT OR WRONGFUL THOSE ACTS AND THINGS (WHATEVER THEY MAY BE AND WHATEVER THEIR NATURE,-WHETHER LIBELS AND SLANDERS, LAW-SUITS, THE V. OLATION OF AGREEMENTS, THE ENTIC-ING AWAY OF WORKMEN, THE TAKING AWAY OF CUSTOMERS, THE GETTING ELECTED DIRECTORS OF THE OPPOSING CORPORATION AND CLOSING IT DOWN, THE REFUSAL TO DEAL, THE RISE IN PRICES, OR WHAT NOT) ARE IN THEMSELVES; IF THEY ARE A STEP IN A PLOT, OR ARE OVERT ACTS LEADING TO THE GENERAL RESULT, OR IF THEY WERE ACTUAT-ED BY THE MOTIVES WHICH ORIGINATED IN THE UNLAWFUL SCHEME (see "Proposition 3"), THEY ARE THE BASIS OF AN ACTION FOR DAMAGES AGAINST THE DOER. NOR CAN DEFENDANTS ESCAPE BY SAY-ING THEY DID NOT INTEND THE NECESSARY AND DIRECT RESULT OF THEIR ACTS (see "Proposition 8").

Wherefore, we respectfully submit that the trial court error in all of the particulars hereinbefore specified.

Respectfully submitted,

HARLAN E. LEACH,

Owatowna, Minnesota.

CHARLES I. BEIGARD,

Owatonno, Minnesota.

JAS. F. WILLIAMSON,

Minneapolis, Minnesota,

#### INDEX TO COMPLAINT.

(The numbers refer to the paragraphs in the complaint as the complaint appears at the beginning of the printed record,)

Par.

- 1 Incorporation, place of business and factories of Creamery Package Manufacturing Co. Its interstate business. Its capital stock and property February 24, 1898.
- 2 Same as to A. H. Barber & Co.
- 3 Same as to F. B. Fargo & Co., of Lake Mills.
- 4 : Same as to F. B. Fargo & Co., of St. Paul.
- 5 Same as to Cornish, Curtis & Greene Mfg. Co., of Pt. Atkinson.
- 6 Same as to Cornish, Curtis & Greene Co., of St. Paul.
- 7 Same as to C. E. Hill & Co. A partnership.
- 8 Execution of contract of Feb. 24, 1898, Exhibit A.
- 2 Competition between said corporations and partnership prior to that date, and as result thereof all merchandise ste sold at "fair and legitimate profit to the seller."

- 10 Interest is business of each above corporations and part-nership. They did over 95 per cent of all business prior to Feb. 24, 1898, in certain states.
- 11 Appealsal of the property of said corporations and part nership.

Paid for in stock of Creamery Package Manufacturing Co.

Creamery Package Manufacturing Co. Increased capital stock from \$400,000 to \$2,000,000.

Creamery Package Manufacturing Co. has assumed to own and has controlled all said other corporations and said partnership since Feb. 24, 1898, in so far as in ex-intence and their property and business.

- 12 Provisions of contract of Feb. 24, 1898, carried out. Creamery Package Manufacturing Co. since controlled by it all other corporations and partnership.
- 13 Names under which Creamery Package Manufacturing Co. has carried on said business, and changes.
- 14 Creamery Package Manufacturing Co. has controlled all the interstate business of all said others. Represented they were different concerns, and that com-

In this way defrauded the public out of many hundreds of thousands of dollars.

- 15 Contract between Cornish, Curtis & Greene Co. et al and Oresmery Package Manufacturing Co. of March 18, 1898, Exhibit A(1).
- 16 Contract between Creamery Package Manufacturing Co. and J. M. Cornish, of March 2, 1896, Exhibit A(2).
- Omtract between Oromory Prebage Hamberbula Cond & H. Barber and W. S. Goodhae, of May 20, 1886 Babbb A(2)

- 18 Incorporation of Owatonus Manufacturing Co.
  Its interstate business.

  Amount of property consided in business.
- 19 Eight contracts by ween Crommery Package Manufacturing Co. and Owntonna Manufacturing Co.; beginning with Exhibit B(1) and ending with Exhibit B(8).

  All mid contracts carried out.

  Interstate business of Crommery Package Manufacturing Co. and Owntonna Manufacturing Co. under said contracts.

  Extras and repairs as well as churus.
- 20 Contract, made and carried out, between Disbrow Manufacturing Co. et al and Owatonna Manufacturing Co., of April 19, 1897, Exhibit B(\$).
- 21 Assignment of patents, pursuant to last above contract, by Disbrow Manufacturing Co. et al to Owatonna Manufacturing Co., of April 21, 1897, Exhibit B(10).
- Contract between Disbrow Mfg. Co. et al and Creamery Package Manufacturing Co., of April 19, 1897, Exhibit B(11).
- 28 Execution of Virtue Deeg contract with Creamary Packs age Manufacturing Co., of January 22, 1960, Exhibit C.
- Default of Creamery Package Manufacturing Ch. as to mid contract.

  It never intended to carry out same, and secured same to prevent these plaintiffs from manufacturing churn.

  Virtue and Deeg fully performed said contract.
  - Willing of complaint by Owatonna Manufacturing Co. in equity suit at Winona, Exhibit D (1). Subposes therein served on these plaintiffs July 16, 1904.
- Answer and replication in said suit, Exhibit D(2) and Exhibit D(3).
- Final decree rendered Jan. 25, 1907, in favor of them plaintiffs, Exhibit D(4).

28. Conspiracy of all defendants herein in prosecuting said

Same was malicious and without probable cause.

Allegations of complaint therein false, except as admitted by answer.

Allegations of answer all true.

What these plaintiffs necessarily did and expended in defending.

All damages joint.

What was done by Virtue individually was in defending the cases and was "for and on behalf of' both these plaintiffs, and all was done "at the instance and on behalf of' both.

List of expenses and damages in that suit.

- 2) Filing of complaint by Creamery Package Manufacturing Co in equity suit at Winona, Exhibit E(1).

  Subposens served on these plaintiffs July 16, 1904.
- 28 Answer and replication in said suit, Exhibit E(2) and Exhibit E(3).
- 21 Conspiracy of all defendants herein in prosecuting said suit.

Same was malicious and without probable cause.

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List of expenses and damages in that suit.

Contract of Feb. 24, 1898, wholly void.

Also all assignments of patents 589,571, 565,720, 600,168, and all patents and patent rights, to Creamery Package Manufacturing Co., all void.

Creamery Package Manufacturing Co. never had any title to any of said patents or patent rights.

This paragraph sets out reasons why they are void; for the different patents on combined churns and butter workers were owned by different concerns in competition, and patents were bought up by Creamery Package Manufacture ing Co. to secure a monopoly in the manufacture, interstate transportation and sale of combined churns and butter workers.

Creamery Package Manufacturing Co. never had any right to bring action of infringement against these plaintiffs on any said patents.

- Assignment of costs by Creamery Package Manufacturing 23 Co. to Owatonna Manufacturing Co., as a part of their scheme, Exhibit E(4).
- Manufacturing and Interstate commerce business of Owatonna Fanning Mill Co. and D. E. Virtue jointly prior to July 16, 1904.

On account of this business were the two suits in equity.

Defendants intimidated customers of Owatonna Fanning Mill Co. and D. E. Virtue; threatened those customers and these plaintiffs with lawsuits for jufringement; all to promote the monopoly of defendants.

As a result the interstate business of plaintiffs destroyed

and their customers taken away.

Their interstate business would have been large and profitable if they had been permitted to continue; they had many prospective customers in the different states.

Owatonna Fanning Mill Co, and D. E. Virtue owners of manufacturing plant and property.

Value of same, \$20,000.

Plaintiffs damaged in loss of use of same in sum of \$4,000 per annum, and plant has decreased in value in sum of 15,000.

Case of Courses, Packing, Manufacturing Co. sould have stood but little injury, except for extravagant claims in simplaint: but an adverse decision in other case would

in a plaint; but an adverse decision in other case voild have raised plaintims, property. The two cases were prosecuted jointly for this remon, and money to attend both.

Proceeded in had faith, and for the express purpose of acting these plaintims to expend their money and reader them benkrupt and thus make it impossible for them to conduct and carry on their said business, and to thus rein and decrease their said interstate trade and commerce, and to prevent them from securing any such interstate trade and commerce, trade and commerce in the future."

On account of these two cases plaintiffs had to quit business. These plaintiffs defended said actions to protect their said

business and interstate trade and commerce.

Everything plaintiffs did was necessary to protect their said interstate trade and commerce and was an additional necessary cost to them in carrying on their said business. At the time of the commencement of said two suits plaintills were so situated with their said manufacturing plant and the services of D. E. Virtue that they would have realized the name and values for the same stated in this complaint.

On account of said wrongful acts plaintiffs obliged to close down, and lost their said interstate trade and com-

Virtue Deeg invention, October 3, 1899, Pat. 634,074, # F(1).

berg never made or sold but two of these experimental

Owatonna Fanning Mill Co., a licenses of D. E. Virtue.
Part of Churus made and sold by Owatonna Fanning Mill
Co. and D. E. Virtus under this patent, and others would
have been except for wrongful acts of defin

Owntonia Painting Mill Co. and D. R. Vietne liberance of These, and he to have nothing from machines made or sold

tains of the line of Figure Pers avention to paintiff

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for five years polar to beginning of this action (Sint. 18, 1908), the sum of \$10,000, except for wrongful acts of defendants, that value per annum. Some all host by wrongful acts of defendants since July 16, 1904.

O Describes why Virtue-Deeg invention valuable; alleges novelty.

Bestleges value of use, \$10,000 per ansum, since July 16, 1904, and all of this would have been available to plaintiffs and enjoyed by them had it not been for the wrong-ful acts of defendants in restraint of interstate trade and commerce.

Plaintiffs have been deprived of whole of \$10,000 per annum since July 16, 1904.

- Virtue-Hagedorn invention, Nov. 12, 1905, Pat. Sc. 624,369, Exhibit F(2).

  Hagedorn never made or sold any machine.

  Owatonna Fanning Mill Co. a licensee of Virtue.

  Part of churns made and sold by Owatonna Fanning Mill Co, and D. E. Virtue under this patent, and others would have been except for wrongful acts of defendants.

  Owatonna Fanning Mill Co. and D. E. Virtue licensees of Hagedorn, and he to have nothing from machines made or sold by them.
  - Value of the use of Virtue Hagedorn invention to plaintiffs for five years prior to beginning of this action (Sepa 18, 1908), the sum of \$6,000 per annum; except for wrongful acts of defendants.

    Same all best to plaintiffs by wrongful acts of defendants since July 16, 1904.
  - Describes why Virtue-Hagedorn invention raleable; alleges novelty.

    Realleges value of use, \$5,000 per samum, since daily 10, 1904, and all of this would have been quallable to plaintiffs and enjoyed by them had it not been for the wrongful sets of defendants in restraint of interestic trade and com-

The second of walls of Escal and the contract

- These describes that the 1997, Its to the fire existing tratanna Fanning Mill Co. a licensee of Virtue.
- Value of each of these rights secured to plaintiffs \$4,000 a room, but that up acres of defendants the plaintiffs have been department of all choice fair 30, 1907.
- Riches why Virtue patent valuable.
  Plainting would have realised \$4,000 per year since July no 1997, out of one of same except for acts of detendants furtion of churus made by plainting had this invention of these improvements and others would have had but some or defendants.
- If of the above vicus of one of patents would have been seried to plainting by their interstate business had it not see the the wrongers acts of delandants in this emphanic
- erstate instances of plaintiffs since July 16, 1904 Complete been consilicual extriction at a long at of acre of delendants.
  - of acts of defendence.
- Alle of Creamen Probage Manufacturing Co. of &

  - of Cashama before that time. a competition with treamery Facts

compatition and according

All sets of decembers done "participative a common setter and completely entired into its 1807 and 1808 and 1802 maintained and carried out.

To secure managedly, and drive all others out of business. By acts of defendants they became members of pani, structed for prices, in restraint of trade.

All businessed regulates prices, limits pendection and

transportation, and limits competition; all of which this were intended.

- By means of same have defendings and March 1, 1898. fixed and silvence prices of delic, and creamery supplies
- All sets of defendance including the bringing of two actions in a second of trade-

By sets of defendants they have destroyed competition and sannopolised interstate trade in U.S. in butter meking

machines, dairy and creamery supplies. By virtue thereof have plainting beau damaged.

All damages to them caused by things maked in this pass

Thereby have defendants hince Feb. 24, 1898, bad on per cent of the churn business in Michigan and Ind and states to the west. Other Brus-night break in for a while, but wou

e this thre detendance have

# light to Pregraphe of Bourgains

including the driving of plaintiffs out of business, and to seems atmosphy.

- 12. 242 contervia, configurations of patentia, and operatorists to
- To introduce on the part of plaintiffs of these things until less than one year, air mouths, before the action brought Defense kept same concealed.

  Plaintiffs know nothing of some until the time for taking testimony for two actions in equity had expired and case submitted to the court for decision.

  Plaintiffs made Exhibit "O" in good faith.
- 12 att exhibits incorporated into complaint.
- This action prosecuted under "Sherman Act."

  But not to recover any domages in which Deer and Hare
  down are part expert.
- ilesistance of parties.
  Incorporation of Oscationas Feating Mill Co.
  All business of Oscationas Faming Mill Co. and D. E. Virtue joint business, each fernishing a part of the property used in business and D. E. Virtue furnishing his services All demages joint damages.

aments and quit claims between them since action local, ranking each plaintiff a one half owner of all

Declaration of the state of plainting engineers.

#### SUPREME COURT OF THE UNITED STATES.

October Term, 1912. No. 80.

Virtue and Owatonns Fanning Mill Company,
Plaintiffs in Error.

V8.

Creamory Package Manufacturing Company, The Owatonna Manufacturing Company and Frank LaBare, Defendants in Error.

## PLAINTIPPS' REPLY BRIEF.

(THE REFERENCES TO DEFENDANT'S BRIEF ARE TO BRIEF OF DEFENDANT CREAMERY PKG. CO. UNLESS BERWISE STATED.)

#### Defendants' Statement of Facts.

Counsel forget to state that one object (we contend the main set) of the two defendant corporations making the 4 Disbrow tracts of April 1897, was to put the Disbrow Mfg. Co. and of them so as to "eliminate the competition that at that between the Owatonna Mfg. Company and the language." (389-b). This is what the agent of the two defendant corporations and the two defendant corporations are sulting in those contacts.

"A.

panies or both of those shurns" (the Disbrow churn and Victor churn) "and have them in harmony rather than antagonizing in regard to trade." (291-c)

We also find this same purpose stated at the following pages. The Record: 888-b, 408-c, 409-b and c, 412-c, 445-c.

The Court of Appeals said (p. 607-a) as follower:

The Record discloses that on the 2d day of October, 1698, by an instrument in writing, Reuben B. Disclose and Darius W. Payne, then owners of letters patent numbered 480, 105, for a consideration, assigned easi patent and the exclusive right to manufacture and said throughout the United States and territories, the Dischow combined churn and butter worker covered by the patent, and also "All subsequent patents for inprovements that may be made to it to the Owatoma Manufacturing Company;" that thereafter the Discrow Manufacturing Company, a corporation organised under the laws of Minnesota, Reuben B. Discrow being the president and Darius W. Payne its secretary, began the manufacture of certain shurse called the Winner or New Discrow.

This 1898 contract is nowhere in this record. The above quotation, placed in quotations marks by the Court of Appeals is not a quotation from the 1893 agreement, althought purports to be such. This quotation is in fact a recital in one of the contracts of April 19, 1897 (p. 90-a). The court of appeals assumes in its decision that this 1893 contract gave the Owatonna Mig. Co. certain very extensive rights. We fail to see how a court can properly do that when the contract itself is not in evilonce. The recital in later contracts are only legal conclusions to the affect of the terms of the 1893 contract. For some reson cannot preferred to keep that contract out of the record pointing are in court in this case to litigate the question of painting are in court in this case to litigate the question of the Owatoma Company secured under that the Owatoma Company secured under that that ever becomes material in the case, but we unlike that until the contract inelf is in evidence what it is; we are not obliged to little assumptions associated what its logal effect of the company to put the Defendants claim that the 1897 agreement went no further than the 1893 agreement required. In this 1897 agreement, the Distroy company and its stockholders agreed

not to engage in the churn or butter worker bus-

of and patent or this contract." (p. 11-0).

Said contract still exists, and probably will over continue to crist. We contend that this clause, and the fore the 1898 agreement which provided for it, is clearly illegal. But we are willing a litigate these questions when the proper time arrives, after the plaintiffs have put in their evidence, and the defendants have introduced their evidence, including the 1898 alleged agreement. We fail to see how these questions could properly be litigated in this case and decided against us when what the trial court did, in substance, was to sustain a demurrer to the complaint and refuse to listen to a large part of our evidence.

to listen to a large part of our evidence.

Counsel for defendant Owatonna Mfg. Co. assert in their brief (pages 21 and 22) that it was "piracy" for the Disbrow Company to engage in business at Mankato contrary to the terms of the "October 2, 1893" agreement. No agreement of "October 3, 1893" is anywhere in this record, and we fail to see how this court can pass on any such question, or how the two lower courts

ould have done so.

Neither is there any 1896 contract in this record.

The negotiations resulting in the Feb 1896 agreement continued several months (p. 221-b) prior to the date of that agreement, and at the negotiations in Mankato in April 1897 which resulted in the Disbrow Co. going out of business, the representative there of the Creamery Co. stated, in order to influence those negotiations.—

"that he" (representative of Creamery Pkg. Co.) controlled the F. B. Fargo Company and several others that are mentioned, I think, in that contract or an addition made at about that date, of some other companies, and at that time he mentioned the name of Burrell; that he wanted to get control of." (p. 392-b).

From the foregoing it is plainly seen that when those 1977 centracts were made, the two defendant exporations were planning on, and seeking to arrange for, the monopoly which they contract. These 1897 contracts was the culmination. Whatever make and of these 1897 contracts when considered acquarately, and, by themes were sufficient evidence in this case to antitle the unit of that they were a means to the illegal and fourth.

is be took the strain of the s

of in their statement of facts, repeatedly lay stress upthy infringement suits, started or threatened, during this partial and their wave forest that the first the state of state of the state of state of the state of state of state of the state of st

"may compare their differences, or the owners of other property may, but they cannot make the occasion an excuse or clock for the creation of incompalies to the public disadvantage." (NATIONAL HARROW CO. w HENCE, OFAT BY F. 30, 2017, R. A. 200).

What we sak in this case is the privilege of trying these qualities to a jury, the way provided by the constitution. We do that the trial court, or the Court of Appeals, had the right to betterily dispose of these inner. Practically, the trial court in a tuning to hear our evidence, sustained a demurrer to the complain We could not very well try the marits of those and infraquent mits on a demurrer to the complaint. In any trial properly or ducted, the defendants could put in their evidence as to those irregument mains after plaintiffs had remark their case, and a would have our chance in rebuttal.

At the top of p. 6 2/ Defendant's brief they would have to court believe that there was only one corporation known as to "P. B. Fargo & Company" which went into the merger contract of Joh & 1892 and they would have the court believe that of the M. 1892 and they would have the court believe that of a temperation that there were two such corporations (as shown p. 1 of our brief in this court) is not true. These were two direct depositions by that name having assessment, and one maintains of famousts (p. 42-b. c).

It is fast the file Pob 24, 1600 contract contained a class to the corporations are copyrations, and one maintains of famousts (p. 42-b. c).

mount plan of which the contract is a must be a contract of April 19, 1877

the control of the co

The true we have refer to is well stated in 8 CYC, 657, 650.

fellows:

two or more persons enter into a comprisely, my set down by either in furtherance of the companies and in accordance with the general plan be not of all, and each compirator is liable for all sets illegally committed in pursuance of the compirator of the computer of the compute

Council state, near the bottom of Page 13 of their brief, their is the big contract of 1898, the only competitors purchased and mixed by the Greenery Package Company were the Coulomb Taxt owners. There is sufficient evidence to show that the risk Cornin & Burn concern (with places of business is St. J. Gleego and Kansus City) was in competition with the many Package when the Creamery Package that these littles is (p. 255-h. c). And also that the Coul & Reed concern was expetited (p. 255-h. c).

Occasion of the description of the same of the OF MINNESOFA TO CHEF ASSERT PACKAGE MANY OF THE ASSERT PACKAGE ASSERT TO THE ASSERT PACKAGE ASSERT TO THE ASSERT PACKAGE ASSERT TO THE ASSERT THE AS

17 of our first brief in this court).

Company to party the excellence of the company of t

ay one pet desided to sup-Earnfacturing Co. factoring Company's etition." (p. 609-b)

"The same is true of the agreement between the same parties of June 4, 1898, which was an agreement for the actilement of certain hitigation, and provided the Owatonna Manufacturing Company should have to ent to manufacture fifty-five per cent of the total ye ly mice made by the Creamery Company or be comp sated in damages. 15 (609-c).

The contract here referred to giving the Creamery Company the exclusive agency, was one of the series of the 4 contracts of April 1897, made at Mankato (p. 416-a and b). These 4 contracts are one transaction, and are found at the following pages of the Record, and are all dated April 19, 1897 (except the assignment of patents, which is dated April 21, 1897), and all show that they were made at Mankato, Minnesota:

Page 89 of Record, contract between the two defendant cor-

Page 89 of Record, contract between the and described porations, "Exhibit B (1)."

Page 89 of Record, contract between Disbrow Mfg. Co. and Owstones Mfg. Co., "Exhibit B (9)."

Page 97 of Record, assignment of letters patent by the Disbrow Mfg. Co. to the Owstones Mfg. Co., "Exhibit B (10)."

Page 99 of Record, contract between the Disbrow Mfg. Co.

The Mfg. Co. "Exhibit B (11)."

and the Creamery Pkg. Mfg. Co., "Exhibit B (11)."

On reading these contracts, it is at once seen that they are one transaction, as testified to by the witnesses at pages 408-416.

The Winner churn was the churn made and sold by this Dis-brow Co. (p. 406-c), with the Creamery Co. acting as its selling agent, up until these contracts were made. And this Winner urn had been on the market several months (p. 407-b). And this Winner churn was the cause of "a lot of competition" during

e (p. 205, a and b, 391-e).

Proper 4 contracts eliminated all the competition created by with the Circuit Court of Appeals can one of these contracts (possibly one of the least obtionable on unifica), and ignores the rest of these contracts, d says that this one contract did not suppress competition, the unit is disregarding the evidence and is closing its eyes to the first contracts and what is fast was accomplished by the same complished by the same complex complex can be completed by the same completed by the s

Careuit Court of Appeals also mays that the "45.55" one cast supported competition. This contract was really up by the two defendant corrections of the monopole

much competition we with in this case. They in it come directly and fa-dbly some of the contract office to and flagrants tition, and only tended to centralise the poto bring about other contracts which could and did suppress

On reading the Circuit Court of Appeals decision, one might that the three judges who decided that ease really believed hat the competition was not destroyed by any contract or consists, but that it was wiped out by accident—comothing that was sever sought or intended, and that the monopoly defendants acquired was something they did not want but was forced upon them, was something they were unable to get away from.

But it cannot be material just how much competition was ppressed by any one contract. This court said as follows in the

llowing case:

MONTAGUE v LOWRY ET AL; 193 U. S. 38:

"Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1 per cent of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing has heretofore been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their non-membership therein from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable longer to compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce."

If the competition was not destroyed by these contracts, then and did the defendants get rid of it? Have defendants been an aroit about it that the Court of Appeals approves of it as a said and smooth job? It looks peculiar to see the Court of Appeals pick out certain contracts that possibly had the least to detrectly with the suppression of competition, and then omit criticaling the other contracts on that ground. The defendants admit deconcede that this competition, prior to the making of these recements, was so intense that it was funnous, and that all the success in the business had as of either into this combine or to bankruptcy.—the bund argument of necessity. That the committion was eliminated little by little, step by step, contract by tract, through the course of a few months, or a few years for a matter, does not alter the fact that the competition was in a climinated; and the use of these contracts in wiping out that an imit to secure this monopoly ran through all these contracts as a direct aid toward the end accomplished, and shows that an imit to secure this monopoly ran through all these contracts. As any it is idle to bicker over the exact amount of competition at was eliminated by each of the successive contracts. If only

of As we understoo trine, it is as follows: If Mr. carload in Owatonna and sh the en at Owatsuna. I would make a contract to in restraint of inter-state commerce; but all restraint that it would be "rea

art of Appeals, and also counsel in their brief, in seek rate the June 1898 ("45-55") contract, state that it missed, but what these suits were, or whether they rit, or their purpose, is not at all disclosed by the res-

contract, however, also provides (78-b):

That equity suit No. 704, now pending in the Circuit Court of the United States for the District of Missessots, Third Division, in which the proofs have m and the testimony printed, shall be brought to a speedy hearing and determination upon the proofs and exhibits in the case:

This contract by this provision, specifically provides for the timustion of the really important litigation then pending, mad of a discontinuance of it. The defendants desired the litter common to have it adjudged that the patent sued on a case was a valid patent. This litigation pursuant to the 5" contract must have been collusive, and was probably ears to secure a decree bolstering up some such scarecrow per d invalid in the case brought by defendant Owate purpose. Therefore, this "45-55" contract, which con ede to end litigation, did not have any such pe purpose and object was to further the ille the two defendant corporations into h ould enjoy its proper share of the illegal n could be better attained by the settlement of th defendants were to have only the two stylestet the Victor and Disbray, it was a going, to have the patents covering these can decision. That was the object. All plaints we the right to litigate these questions before a common law contract, the Grosmery Company succeeded as Company agree to suppress the manufacts churts, as shown at pages 78-c and 73-a of the contract.

And in this "45-55" coutres, the Crossery Company grooment from the Owetenra Company that the late coute infringement suits, and the Crossery Company ive "any possible assistance" in such prosecution righ the only interest the Creamery Company had a things was by reason of its illegal contracts.

The Circuit Court of Appeals anys:

"We then have a case where two suits are br one by a party to a lawful agreement, the et of patents owned by these respectively." (p. 610.a).

The Court of Appeals rides roughshod over our contention the Creamery Company never had any title to its patents in which it had a right to bring any suit. This is conclusiveactiled by the decision of this court in PECK v HEURICK, U. S. 624, 42 L. ed 302, 17 S. Ct. 927. This lack of title was eded by the trial court (p. 565-c).

In the Court of Appeals decision is the following:

"There is nothing in the warnings given in thus case to show that the letters or notices were false, malicious, offensive or opprobrious, or that they were used for the willful purpose of inflicting injury." (611-a).

If the Creamery Company did not own any patents, would it be false for it to say that it did own patents and that these intiffs infringed its patents? The Creamery Company eannet ape being charged with knowledge and notice of the kind of it had. Further, the agents of the Creamery Company state these plaintiffs infringed "the Disbrow patent owned by the mery Package Manufacturing Company." (486-c, 487-a). Creamery Company never owned any Disbrow patent; the row patents were owned by the Owatonna Mfg. Co. mery Company never held even any illegal conveyance of any ow patent. Therefore, the reports circulated by the Creas Company were false to the knowledge of that company.
But the real fallacy of the Court of Appeals decision is that

neiders and treats each separate fact, contract and act of the adants in getting their monopoly by itself, separate and apart the scheme with which it is connected. The Court of Apsesumes that if two concerns gut a monopoly by innocently ging contracts, and by other means not criminal in them, that is the end of it, and a person damaged and injured one proceedings, and a person in fact driven out of business one proceedings, has no ground for complaint. We say that

ti-trust law was enacted to cover just that case.

THE COLUMN TWO IS A PROPERTY OF THE PROPERTY O

der this head appearing in defendant's brief, counsel critiour position that, if the Feb. 24, 1898 agreement was merely agreement, putting the patents in the name of the Cre Company for purposes of monopoly and control, not an actual

inferior courts affect by commet under this b of inverior course also by commen union this residence it was sought to defeat the title of complain implainant had acquired by a valid contract and ct illegal under the anti-trust law or for any or showing that the complainant had at some time in to or become (or even then was) a member of an illeg nce the se cases have no bearing whatever pr

er in the FRITTS v PALMER (132 U. S. 282) at all point. The case did not involve any criminal statute; it did no involve any transaction branded by statute as illegal. The case much nearer the dividing line, as shown by the dissenting open on. The rule is, as we understand, that where a statute impos sensity on a contract or act without prohibiting it or expre it illegal or void, there is much variance in the decision s to whether a contract in violation of such statute is void, or will be upheld as valid and the restraining effects limited to the enforcing of the penalty (9 CYC. 476 et seq). But in the FRITTS v PALMER case there was not even a criminal punishment at tached; there was simply a statutory prohibition; neither was any thing declared illegal or void. The anti-trust law expressly deres such prohibited contracts "illegal", and also every such embination in the form of trust," and makes the entering into of the same a criminal offense, and gives threefold damages to the the following:

The constitution and laws of Colorado, it should be

observed, do not prohibit foreign corporations altogethe from purchasing or holding real estate within its limits They do not declare absolutely or wholly void, as to persons, and for every purpose, a conveyance of real e tate to a foreign corporation which has not previously done what is required before it can rightfully carry a business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite a conveyance. So far as we are aware, the only penalt cosed by the statutes of Colorado upon a foreign constitute carrying on business in the state, before a ring the right to descent on carrying on business in the state, before as the right to the same, as bound in section 262 of the chapter, which provides: \( \lambda \) failure to condit the provisions of sections 25 and 24 (section 25) of this act shall render each and over agent, and stockholder of any such corporation. failing herein, jointly and severally personally any and all soutracts of such company made a caste during the time that such corporation default." The fair implication is that, in the set of the legislature of Colorado, this penalty

mple to effect the object of the statute he terms upon which foreign corporation in that state

At the following pages of Record, it is shown that the only the Creamery Company had to the patents which it brought on was such title as it acquired through the Feb. 24 18 tract; 216, 217, and references at top of page 12 of plaintiffs

of in this court.

Counsel argue at length that, if the title be not in the sasignee, it must be in the air. As we understand the decisions of this sourt and of the other courts (p. 12-15, our brief in this court) as title is in the assignor. In fact, in the first case cited at top of page 15 of our brief, the assignor was plaintiff, and the court seld that he was not divested of the title by the illegal contract

and transaction and that he could recover.

The Harriman case (bottom of p. 76, defendant's brief) was simply an application of the IN PAR DELICTO rule. To hold therwise than did this court in this case would be to violate this rell established rule. Of course in this case, as well as in many ther cases where this rule is applied, it is easy for any coursel s extract sentences looking towards the recognition of the title the assignee. And in so far as the court refuses to act at the stance of the assignor, it is the recognition of a title in the assignes. But this is not a recognition of the validity, or effectiveon, of the contract purporting to convey title (for that validity expressly denied.

THE DEGREE IN THE CREAMERY COMPANY'S PATENT SUIT.

Under this head (p. 82 of defendant's brief) counsel finally neede that the Creamery Company's decree was only "interloc-"This is an admission that plaintiffs had the right to prove the trial of this case that they never infringed any patent held claimed by the Creamery Package Company, as we offered to give and took our exception to the refusal of the court to permit the proof (p. 568-b, c of Record). Therefore, we stand before a court now free and clear of any charge of infringement. We also free of any charge of infringement. ound that the Creamery Company was devoid of any title to the nts it sued on.

Counsel say that to allow that interlectory decree to stand, to give these painting damages in this case, would be "perseand topsy-tarby." (p. 84, their brief). In the case at barmont assume that the correct final decree will yet be entered the infringement suit. To render an erroneous decision in this for fear an erroneous final decree might be entered in the or case is certainly a novel argument. In fact their decree is citically useless and of no damage to these plaintiffs; for the son that the alleged infringement was so slight that it could not terially affect or interfere with the business of these plaintiffs; was rather in the nature of a technical infringement. There

ged. Plaintiffs could have proceeded with their into ones and trade by making a few slight changes in the as to comply with the interloctory desire. This is doct forth in our complaint in this case (p. 21-c. d. Having offered to prove on the trial that we never any patent of the Creamery Company (which we also as complaint, p. 15-c), and, therefore, standing before the scharged of any claim of infringement, we were not re-

At the bottom of p. 83 of their brief, counsel quote the words of the trial court, as follows:

"The reason why these damages were suffered by Mr. Virtue was not this unlawful combination, but the set of infringement by himself. If he had not infring the patent he would not have suffered any damages.

Here the trial court seems to have entirely forgotten about resecution by defendants of the suit in the name of the Own Manufacturing Company, and the large amounts Mr. Vipaid out in defending that suit and the damages he sustaine prosecution of that suit, all of which damages we offered show on the trial. Also it was for the jury, and not for the i judge, to have said how much of Mr. Virtue's damages was to the combined forces of all the defendants in prosecuting suits, and how much was due to his slight, technical, and w eir mile, ab any immaterial, infringement, even if the Creamery Company owned its patents and even if Mr. Virtue did infringe. At p. 86 of their aragment, counsel state:

"In short no one is injured by the violation of a statute unless, in addition to the violation, he can show a wrong actionable at common law."

This in fact is the sum and substance of defendents whole are not. The gentlemen who defended this case have been a facility with actions at common law that they can see must in conthing else. And this is in fact what the Circuit Court is, thus absolutely ignoring the decisions of the United States court to the contrary.

We would like to sak what common law principle was violated the CONTAGUE we DOWRY case, where the only over the contrary.

We would like to sak what common law principle was violable in the MONTAGUE vs howard case, where the only overt as complained of was that defendants refused to deal with plaintiffs and in the CHATTANOOGA v ATLANTA case, where the only overt act complained of was that the seller had raised his price a small amount over his former selling price? And also in the LOEWE v LAWLEE case?

Although these three cases last above cited were argued, as reargued, to the Court of Appeals, that court seems to have overlooked them entirely, and based its decision on WHITWELL this Whitwell case that damages could not be predicated upon a refusal to deal for the reason that the seller has the legal right a

HONTAGUE BOWN

Counsel say that our case here is an article for mention. This is on the same theory, of course, that we have some common law action. If it has say of a common law action, it has the elements of an a se action, which can be maintained during the pendency of tion complained of and even though there was no lack of processes. (See top of p. 25, our other brief).

### STATUTE OF ADDITATIONS.

This question was not raised or passed upon in the trial court. The only ruling by the trial court was (in substance) the sustamof a demurrer to the complaint on the ground that the comwint did not state a cause of action.

However, we think the position that the 7th section of the antirust law does not impose a penalty is rightfully sustained in HATTANOOGA F. & P. WORKS vs ATLANTA, 208 U. S. 390,

11 L. ed. 241, 27 Sup. Ct. Rep. 65.

The Minnesota statute referred to in the decision of the Minots court cited in counsels' brief, is altogether different, for it plain to be seen that that statute intended its provisions to be the nature of punishment inflicted upon the trespasser rather an as compensation to an individual on account of the serious m of his injury and the difficulty of making a collection. The section is more like the provisions under consideration in the slowing cases:

CONVERSE vs HAMILTON (decided April 1, 1912), page 415 of the Advance Sheets of the United States Su-

preme Court of May 1, 1912.

NATIONAL NEW HAVEN BANK V N. W. QUARANTE LOAN CO., 61 Minn. 375, 63 N. W. 1079.

FLOWERS - BARTLETT, 86 Minn., 213, 68 N. W. 916. STATE V RAT PORTAGE LUMB, CO., 106 Mina. 1, 115 N. W. 162, 117 N. W. 922.

QUILD \* PRENTIS, 83 Vt. 212, 74 At. 1116, 22 Ann Cas. 318.

THE COMMINATION TO BRING EVERS AND TO CUROULATE

Counsel claim that a combination to bring suits is not within Shorman Law (p. 116, their brief). They do not argue but at such suits and threats may be a step in a successful plan to a monopoly of a particular line of interstate commerce and de and to do away with competition. It seems to us that, all ough their brief, counsel have avoided arguing the real issue in a case. They have avoided it because it is too plain for arguent that the prosecution of those two suits and the circulation these threats was in fact a step in the elimination of these

time of this suit was a stop in the scheme.

LOFWE v LAWERE come it was argued that a combination of interests to better their condition was not a combination of interests trade and commerces; in the MONTAGUE Process it was argued that the mere return of one person with another was no combination in restraint of trade, and the CHATTANOGGA & CO. - ATLANTA case, it was argued at a slight increase in the price of a commodity was not any combination or complicacy.

Counsel do not make any attack upon these cases, or upon principal announced therein.

The trial court found and held that

"there is sufficient evidence to warrant the jury in finding that there was an agreement to bring these cases together." (n. 561.a)

together. (p. 5614)

COMBUNATION AMONG PATERY OWNERS.

Under this head commel claim brisdly that all combinations otherwise in violation of the anti-trust law, are valid if based or a few patents, and they torture the Dick decision into a support of this dectrine. We shall not follow their argument at page 118-129 of their brief. We simply cite the decision of the Main court of July 3, 1912, to the contrary. This decision was rendered since the writing of our first brief in this court and covers the whole ground and is concurred in by the entire seven justices. It is the only case we know of by a court of last resort on precisely this question.

UNITED SHOE MACHINERY CO. W LACHAPPELLE (Mass).

99 N. B. 289;

THE ACTUREING COMPANY, 110 Minn 415, 126 N. W.

patent (letters patent) is a monopoly on paper only.

Every suit on a patent is a suit to get a monopoly in fact. tire on a

ent is only a potentiality; the putting of the other touchess by a suit and decree is the realization. ecting of patents is only the collecting of paper day a messas to an end. The prosecution of suits as to accomplish the end.

ion of the suits is want really brings about the

Ales the threats of suits against others, and the

of claims of infringement.

He collecting of the potents is prohibited by the anti-treat because of the monopoly of the industry effected by such ting, It is the resulting monopoly that is visious, inviting which brings about that resulting monopoly is equal-jectionable. If suits on those patents are employed for that per, those suits offend as much against the anti-trust law as the collecting of the patents. If the collecting be illegal, th (the next step towards the same end) must necess

The defendants collected the letters patent so as to be in a tion to bring sults and to circulate threats of suits and claims afringement so as to obtain (which they did) the monopoly of

industry.

We fail to see how the collecting of the patents (the first )) can be illegal, and the resulting monopoly (the third and minating step) also illegal, and yet the prosecution of the suits account and intermediate, and a necessary, step) perfectly legal proper. To say this second step is legal is to consider it a disassociated from what precedes and what follows.

But in the case at bar we have two patent suits presecuted

tly by two complainants pursuant to "an agreement to bring two suits together." (552-b). Each complainant is guilty the wrongful sets of the other in so far as the end sought is

By this combining of the two suits we have another element ted into the case. It is the attempt of each of the two de int corporations, acting concurrently, to do its share towards ing the monopoly.

For, if one suit on one patent is a proceeding to get a monoptwo suits, brought and prosecuted concurrently, on several

nts, is a proceeding to get a much greater monopoly.

The defendants understood the force to be added by the con ent prosecution of the two suits, and they acted accordingly. were seeking to obtain the end sought by their several a were seeking to obtain the difference of patents and the and the end sought by their collection of patents and the ing of them under their joint control, or practic ing of them under their free party of those patents. Yet but these plaintiffs did not infringe any of those patents. Yet defendants drove plaintiffs out of business by those suits, and thereby maintained their menopoly.

indants thereby maintained their menopoly.

Therefore, the defendants maintained and secured, not only a opoly within the scope of all the combined patents ostensibly by them, but also a monopoly of a large part of the inter-commerce which was not covered by any said patent, but rightfully belonged to these plaintiffs. It was son ndents sought for they considered that their patents would atroi the world." (p. 311-c). This business of these plainings covered and protected by plaintiffs' patents. Thus delants obtained the monopoly covered by the patents they imed and also a monopoly of the business covered by the pat-

laintiffs owned.

pialitims owned.
When defendants took away and secured for themselves this is of the business not covered by their combined patents, here is rightfully belonged to plaintiffs under their patents, they being plaintiffs out of this business, accounted a large amount after that compares clearly prohibited by the auti-trust law.
The foregoing paragraph injects into this case another ele-

at, altogether different from the getting of a menopoly within

scope of all the patents collected.

Defendants did not chance any one suit; they intended to be etful and make a clean job of it. For this they relied upon the combined forces of the two suits. Perhaps it was this which drove plaintiffs out of the business they were entitled to exclusively

under their patents. It was for the jury to say.

That defendants intended to get all this business is shown by the statements of their agents just prior to the time they com-menced those suits, as follows: One said to Mr. Virtue, "WB THINK WE OWN THE CREAMERY SUPPLY BUSINESS ROUND HERE." (519, a, b). Another one said to the drayman of these plaintiffs that he, the drayman, "WOULDN'T HAVE MANY MORE CHURNS TO HAUL FOR" these plaintiffs, as the defendant corporations "WERE ABOUT READY TO CLOSE IN ON" these plaintiffs "AND PUT THEM OUT OF BUSINESS." (549-b). Another one said that if Mr. Virtue "BUILDS A CHURN WE WILL PUT HIM AGAINST THE WALL." (590-b).

These statements were made by defendant LaBare, and by the agent of the Creamery Package Company who was instrumental m the prosecution of the infringement suit brought by that company, and who was also a director of the company. LaBare also signed and verified the bill of complaint in the case brought by the Owatonna Mfg. Co. (p. 109). Of course, a statement made by defendant LaBare is admissible against him. And statements made by an agent of a corporation in reference to the business at hand is ible. And where an agent of a corporation assumes to act for the corporation, it is conclusively presumed that he is authorised to se act, in the absence of proof that he was not so authorised or that he was acting for himself.

MUNDAL + MINNEAPOLIS &c RY. Co., 92 Minn. 26. WHITE V INTERNATIONAL TEXTBOOK CO. (Iowa), 121

N. W. 1104.

WHITE T APSLEY LUMBER CO. (Mass.), 80 N. E. 500, 8 L. B. A. N. S. 484.

HENDERSON V SAN ANTONIO & R. R. CO. 17 Tex. 560. 67 Am. Dec. 675.

LEWIS WILLOUGHBY, 43 Minn. 307.

There is nothing in any of these statements about patents, or about infringing patents. That was a secondary consideration. The object was to put these plaintiffs out of business; the means were immaterial, but would be secured.

The prosecution of the two suits was but one act.

A cause of action is properly defined as a right in plaintiff infringed by some act of defendant. In the case at ber the right of plaintiffs was to conduct their business without interference by my act of defendants which was a stop taken by defendants to secure, and which was a direct aid in securing, an illegal monopoly.

The defendants sought and intended to clothe their creature in such a way that it would puss muster in the courts. The evidance in this case shows the illegality which defendants sought to sover up. Courts of justice deal with substance rather than with

appearances.

The two lower courts held that there is no evidence in this case to show that defendants intended to drive plaintiffs out of business. But counsel for defendant Oreamery Company say in their brief, at page 82, as follows, of these plaintiffs:

"They could not manufacture without infringing

the Creamery Company's patents."

It seems to us this is a fatal admission of claim on the part of defendants. We find a similar contention in the brief of the Owatonna Co. The counsellors know what defendants claimed and what they intended. They intended to have the court hold, in the patent intringement suits, that these plaintiffs could not remain in business without infringing their collected patents, and that, therefore, they must cease business. If defendants claimed their patents controlled the world, and that plaintiffs could not remain in the business without infringing, then it is clear that when defendants brought their suits to prevent plaintiffs infringing, they metended and expected to make plaintiffs stop manufacturing, to put plaintiffs out of business. The counsellors really know what defendants were trying to do, although the Court of Appeals was unable to see it.

The Court of Appeals puts great stress upon the claim that there is no sufficient evidence to show that the two defendant corporations entered into a specific agreement, in restraint of trade to drive these plaintiffs out of business. The court holds that we must prove a definite specific agreement (possibly in writing) to drive these plaintiffs out of business, before we can recover in this case. The trial court holds likewise. We say that any such rule as this is a perversion of justice and is carrying the anti-trust law to the point of foolishness. It is easy for two corporations to cover up and conceal their agreements and understandings.

These plaintiffs are more concerned with what was in fact accomplished against them, with the business and of the proposition, out in the open, rather than with what was concealed and covered up in the records, papers and minds of defendants, their age is and officers. The directors of the Creamery Company could have held a regular meeting of the board and passed a resolution, with due formality, that they would prosecute their suit independent of the Owatonna Company and that they would not prosecute any suit to drive Virtue out of business, and had such resolution duly recorded in the minutes, and they could at the same time have

d the "wink" around. The Court of appeals we the resolution conclusive. The "wink" would a

NELL OF THE PARTY

is court has so often laid down the rule in these anti-trest solvense that it seems superfluors to cite cases from other re refer to a few.

GARLAND V STATE, 112 Md. 88, 75 Alt. 681, 21 Ann. Cas.

28:

"Where the object of a conspiracy is to commit a erime, or do an unlawful set, the means by which it i to be accomplished are immaterial."

STATE vs STEWART, 59 Vt. 286, 59 Am. Rep. 710: LONGSHORE PRINTING CO. v HOWELL, 26 Ore. 527, 46

Am. St. Rep. 640:

"A combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means whether such means be illegal at common law or by statute, is a common law conspiracy."

BROWN V ALLEN & JACOBS PHARMACY CO., 115 Ga 429, 41 S. R. 558, 90 Am. St. Rep. 126, 57 L. R. A. 547;

"There is no inherent wrong in the mere act of firing a pistol, in a place where not prohibited by law, but it may become very wrong if it is fired at the per-son or property of another, and may give a right of action to him for resulting injury. A combination like a revolver, should not be aimed maliciously or with

reckless disregard of the rights of others."

"The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by ral or illegal means, whether such purpose be illegal at dominon law or by statute, or to affect a legal pur-pose by illegal means, whether such means he illegal at in law or by statute, is a common law conspir-

"But as new methods of doing injury to others are invented, in modern times, the same principles must be applied to them, in order that pescenable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of res-

edy must be used."

KLINGEL'S PHARMACY - SHARP & DOHME, 104, ME 218, 7 L. R. A. N. S. 976, 118 Am. St. Rep. 399, 64 AM 1009, 9 Ann Chees 1184:

"An act performed in the furthering of an unlaw.



The more patents the Creamery Compuny collected by its il-al 1896 agreement the greater the resulting restraint of trade, I hence the greater the illegality of such conduct. Also the re competitors it could put out of business and hence the greatthe damages caused to such competitors. Therefore, the more competitors (or any competitor) infringed the patents thus sected and held, the greater the damages they would be entitled under the anti-trust law if made to stop such infringing by Creamery Company. For, the true owner of such patents has rer made any objection to the competitor being in the business. t does not assist defendant Creamery Company if these plaindid in fact infringe a patent owned by someone else.

and State and St

Whether plaintiffs in this action ever infringed any patents of any lawful holder might be material (and might not) on the tion of the amount of plaintiffs' damages in the case at bar,

t not otherwise.

A patent infringement suit is much like an ejectment action; it is to eject defendant from the domain claimed by plaintiff,

A plaintiff, in ejectment, must recover on the strength of his we title.

King v Mullins, 171 U. S. 404, 18 Sup. Ct. Rep. 925, 43 L. ed. 214

An illegal deed, or one based on an illegal consideration, or a deed absolutely void because in fraud of creditors, is not suffi-

15 Cye. 17, 44, note.

Kirkpetrick v Clark (Ill.), 8, L. R. A. 511. "These maxims," ex dolo malo etc., "are applied to executed transactions as well as to those which are executory." (In this case plaintiff failed in ejectment because his deed was in fraud of creditors, being in violation of statute)

Watkins v Nugen, 118 Ga. 372, 375, 45 S. H. 262. A court of equity will not lend its aid to either party to an executed contract founded as an illegal considera-tion. A deed founded on the promise of the grantee to do an unlawful act is absolutely void. Such grantee (plaintiff herein) cannot recover thereon.

If the deed be only voidable, and not void, there is reason for

ful enterprise cannot be a lawful set, though the same act would be free from censure if done with some other view."

GATZOW v BUENING, 106 Wis. 1, 81 N. W. 1003, 49 L. R.

A. 475, 80 Am. St. Rep. 17:

"This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and the selfish ends of particular classes. There is clamor for laws to prevent combination, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood."

"A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful."

"Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy, has his action at law for redress in damages."

MARTELL v WHITE, 185 Mass. 255, 69 N. E. 1085, 64 L. R.

A. 260, 102 Am. St. Rep. 341:

"The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectable, and the standing threat of their imposition may be properly classed with the ordinary threat of suits upon groundless claims."

UNITED SHOE MACHINERY CO. VS LACHAPELLE

(Mass), 99 N. E. 289:

"As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the states which cannot be perpetuated successfully without contracts of like tenor with all practicing a similar craft, it partakes of the illegality of the scheme."

In this Mass. case, it is held that whatever is "in direct aid of monopoly" is illegal, citing with approval cases in this

praturners and the court to permit us our damages are near the top of page 568, being Junes of 11. The court then and there allowed the exception at the directing of the verdict.

The directing of the verdict.

duly took exceptions, allowed by the court, to the and at the following places in the record, to-wit.

No. 2. Exception found at p. 568-a. ent No. 3, Exception found at p. 569-a. ent No. 6, Exception found at p. 569-a. mt No. 7, Exception found at p. 243-c. nt No. 8, Exception found at p. 245-b and e. nt No. 9, Exception found at p. 248-b. ment No. 14, Exception found at p. 493-e.

sent No. 21, Exception found at p. 436-a. sent No. 22, Exception found at p. 568-b.

mt No. 23, Exception found at p. 568-c. ment No. 24, Exception found at p. 568-c.

rement No. 26, Exception found at p. 552-b.

These exceptions completely cover every phase of this case. Plaintiffs failed to take exceptions to some of the rulings of the court on questions submitted to witnesses, but these are imma-terial, and the same testimony is covered by other exceptions.

But plaintiffs established damages by the evidence in the se. Plaintiffs were driven out of business in Michigan by the to of the defendant. Pages 450-455, Record. Also in South Detota and in northwestern lows. 467-474 of Record. If the trial ert had, at the beginning of this case, refused to hear the eviand directed a verdict against us on the ground that the plaint did not state a cause of action, we would need to have complaint did not state a sause of action, we would need to have taken, but one exception to that ruling, and it would have been needed to make offers of proof. That is really the situation is this case, although the trial court did not direct a verdict unit we had proceeded towards the end of the case. We believe a exception alone to the action of the court in directing a verdic against us would be sufficient. But, nevertheless, we made our of fers of proof and duly and fully took our exceptions to the rulings at pages 568 and 568 of Record.

### IN CONCLUSION.

In view of the patent infringement suit now pending betwee laintiffs and defendant Oreamery Pkg. Co., plaintiffs are desire in this case of securing a decision expressly covering the qu tion as to whether the Creamery Pkg. Co. secured any title wi er to its patents through the Feb. 24, 1898, agreement and as hether any court of equity should entertain a suit on a title watents so acquired. We believe these questions are directly many case, and, of course, if they are, they will be decided by this it. They are also directly in the patent infringement suit, it will take thousands of dollars and years of litigation to those same questions before this court in the patent infringet suit. A decision on these points in this case really ought to one of all this litigation. We believe we can very properly the attention of this court to these things in this brief.

The Mass. Supreme Court says, in the case of UNITED RHOK CHINERY CO. y. Lagge APELLE July 2, 1012 (9) N.

FACHINERY CO. v LaCHAPELLE July 8, 1912 (99 N. E., at

91), as follows:

"It is fairly inferable from the averments of the answer and the offers of proof that the constituent competing companies out of which the plaintiff was formed each owned valuable patents for machines used in the making of footwear. Therefore the further question arises whether a combination among several patentees of competing devices is within the inhibition of the statute. There is no decision by the United States Supreme Court covering this point, although there is an intimatio in Bement v National Harrow Co., 186 U. S. 70, 94, 95, 22 Sup. Ct. 747, 46 L. Ed. 1058, to the effeet that such a combination may be illegal under cortain circumstances."

"That was an action to recover liquidated damages for breach of several contracts in relation to the manufacture and sale of patented implements. There was no finding by the referee, on whose report the decision was founded, that the plaintiff had become an illegal monopoly by reason of a combination of different persome owning distinct patents. Whatever allegations in the answer looked in that direction were not supported by the finding of the referee. In its last analysis it relates to conditions attached to the sale of patented arti-

The question whether a corporation can acquire title to prop through the medium of an illegal agreement directly for through the medium of an illegal agreement, directly in vic-of the anti-trust law, is a very important one.

n of the anti-trust law, is a very corporation, he seeking to Also is the question whether such corporation, he seeking to see and secure a monopoly of inter-state trade and commerce and secure a monopoly of chould have the active an titles to patents so acquired should have the active and titles to patents so acquired should have the competito orful assistance of a court of squity to put the competitor of business, whether such competitor be an infringer of noting above that without such willing assistance of a court of its the emperation would probably fall in its illegal enter-

> Respectfully submitted. HARLAN R LEACH, (JAMES F. WILLLAMSON and JAMES A. TAWNEY, of Counsel,)
> For Plaintiffs in Error.

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# Supreme Court of the United States.

OCTOBER TERM, 1912. No. 80.

D. E. VIRTUR AND OWATONNA FANNING MILL COMPANY,

Plaintiffs in Error,

AGAINST

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWATONNA MANUFACTURING COMPANY and FRANK LA BARE, Defendants in Error.

IN EBBOR TO UNITED STATES CIRCUIT COURT OF APPRAIS, EIGHTH CIRCUIT. (179 Fed. R. 115.)

Brief of the Creamery Package Manufacturing Company, one of the Befendants in Error.

## STATEMENT OF THE CASE.

[The references are to pages of the printed record. The additional letters "a", "b" and "c" refer, respectively, to the first, second and last third of the page.

The plaintiffs in error—plaintiffs below will be referred to as "plaintiffs", and defendants in error as "defendants". This defendant will be called "the Creamery Company"; and in order to distinguish between the defendant, The Owatonna Manufacturing Company and the plaintiff The Owatonna Fanning Mill Company, we shall designate the latter as "the Fanning Mill Company" simply.]

The lengthy statement of the case in the brief of the plaintiffs in error is neither accurate nor complete, and is much confused by an intermixture of argument and inference. It is, therefore, deemed desirable to make a succinct statement of the facts as they appear in the record.

The Nature of the Action: The action was brought under the 7th Section of the Sherman Law (Act of July 2d, 1890, 26 Stats. 209) to recover treble damages. The claim of the plaintiffs is that they have been injured in their interstate business by the prosecution of two patent infringement suits, one by this defendant successfully, and the other by the defendant, The Owatonna Manufacturing Company, unsuccessfully. They have a further claim of damages arising from the statements made to the plaintiffs' customers by the defendant's agents that such suits had been or would be brought, and that users of The Owatonna Fanning Mill churn would be held liable. The complaint states expressly that the action is "brought and prosecuted under the Sherman Law" (p. 38-b), and treble damages to the amount of \$406,000, are demanded under that Act (p. 41-c). The suit is based on a number of written instruments, four of them (Exhibits "B-9", "B-10", and "B-11"—pp. 89-101—and "B-1"—p. 69) made in April, 1897, as a single transaction between the defendant corporations and others; another made in February, 1898, by the Creamery Company with a number of persons and corporations, not including the Owatonna Manufacturing Company or La Bare (Exhibit "A", p. 41); and another made in June, 1898, between the defendant corporations (Exhibit "B-4", p. 77).

The 1897 Agreements: In April, 1897, the two defendanta entered into negotiations with the Disbrow Manufacturing Company and its officers, Reuben B. Disbrow, Levi A. Disbrow, and others, for an adjustment of their mutual rights under outstanding contracts and for a compromise and settlement of litigation then existing or threatened (pp. 389-c, 396-a and b, 397-a and c, 399-a 401-b and c, 402-a, 416-418-b). The principal source of controversy was an agreement of October, 1893, whose terms are locited as part of one of the April, 1897, contracts (Exhibit "B-9", p. 90). By this agreement Reuben B. Disbrow and Darius W. Payne (being then the owners of letters patent No. 490,105) gave to the Owatonna Manufacturing Company "the exclusive right to manufacture and sell throughout the United States and territories thereof the Disbrow combined churn and butter-worker under said patent No. 490,105, and all subsequent patents for improvements that may be made to it" (p. 90-b). The Owatonna Manufacturing Company claimed that the churn manufactured by the Disbrow Company—the Winner churn—was being made under improvements which were patented by Reuben B. Disbrow after the 1893 agreement, and therefore belonged to the Owatonna Manufacturing Company as "subsequent patents" (pp. 399-442-b).

In April, 1897, at least three suits involving this agreement were pending (pp. 416-b, 419-a, 419-c, 420-a, 441-c). These suits arose out of the claim asserted in good faith by the Owatonna Manufacturing Company that the

Winner churn was being manufactured by the Disbrow Company contrary to the rights given to the Owatonna Manufacturing Company by the 1863 agreement (p. 403-b). There was also an injunction suit by the Disbrows to prevent the Owatonna Manufacturing Company from getting certain mail (p. 442-c).

At this time the Creamery Company had a contract with the Diabrow Company for the sale of the Winner churn (pp. 417-a, 420-b). This contract had been made in October, 1806 (pp. 90-c, 420-c), and under it the Creamery Company was selling the churns manufactured by the Diabrow Company (p. 431-a), which the Owatonna Manufacturing Company claimed to be in violation of its October, 1803, agreement. The Creamery Company also had a mortgage on the Diabrow plant for about \$300 (pp. 98-c, 420-b).

On April 19th, 1897, the negotiations resulted in four instruments. One (Exhibit B-9, p. 89, &c.) was between the Disbrow Manufacturing Company and others associated with it on the one side, and the Owatonna Manufacturing Company on the other. By this instrument the October 1893 agreement was mutually released (pp. 91, 92); all suits were settled (pp. 90, 95-a), and the Disbrows sold their patents (p. 91-a) and their machines, tools and patterns (p. 84-c) to the Owatonna Manufacturing Company and retired from the churn business during the life of the patents (p. 91-b). Exhibit "B-10" (p. 97) was an assignment of the Disbrow patents in pursuance of Exhibit "B-9". Another instrument between the Owstonna Manufacturing Company and the Creamery Company (Exhibit "B-1", p. 60) made the Oreamery Company the exclusive sales agent for all the churns manufactured by the Owatonna Manufacturing Company. (This instrument is the one principally attacked by plaintiffs.) The fourth instrument was between the Disbrows and the Cramery Company (Exhibit "B-11," p. 99). By its provisions, the October, 1896, agreement was released and discharged, the amount due on the mortgage on the the plant was to be ascertained and the mortgage satisfied on payment (p. 100-e), and the Creamery Company agreed to pay to the Disbrow Company royalties thereafter falling due from the Owstonna Manufacturing Company (p. 101). All four instruments were executed at the same time and were in fact as well as by their recitals, parts of a single transaction (pp. 73-b, 91-a, 93-a, 98-a, 100-a).

The purpose and effect of these instruments was to settle the pending litigation and all matters concerning which the parties were at variance (pp. 417, 418-a, 420-c, 421-a) and to cause the Disbrow Company to cease manufacturing combined churns (p. 428-c) under patents which the Owatonna Manufacturing Company claimed as its own (p. 402-a). No legitimate competition was affected. The Disbrow Company ceased manufacturing the Winner churn. But the competition (such as it was) from that churn arose from what the Owatonna Manufacturing Company insisted was the Disbrow Company's ecronqful act in violation of the October, 1893, agreement (p. 403-b). The Disbrow Company's right to manufacture the Winner was one of the very matters in litigation between the two companies, and with other disputes and lawsuits was settled by the instruments then made (pp. 90, 95). These instruments dealt solely with manufacturing under United States patents,

The 1898 General Agreement: Under date of February 24th, 1898, this defendant, A. H. Barber & Company, F. B. Fargo & Company, Cornish, Curtis & Greene Manufacturing Company, Cornish, Curtis & Greene Company and other stockholders (these concerns being corporations) and C. E. Hill & Company (a co-partnership) made the agreement shown as Exhibit "A" of the complaint (p. 41, ac.). This agreement (which we shall call "the 1898 General Agreement") recites that the Creamery Company was about to increase its capital stock by \$1,600,000, making a total capital stock of \$2,000,000, and that it proposed to buy out the business of the other corporations and the partnership with some exceptions (p. 43-a). It then details the terms of the purchase. Each concern must guarantee its own accounts (pp. 43-a, 44-a) and the merchandisc owned by each is to be appraised by a committee p. 44-b) to the end that each of the parties may receive of the capital stock of the Creamery Company, at par, an amount equal to the actual value of the property purchased from it (p. 48). The unissued stock remains in the treasury, to be disposed of as the Board of Directors may determine (p. 49-a). The other corporations are to be dissolved (p. 50-a), but the Creamery Company is given the right to carry on the business of the various concerns in the names theretofore used by them (p. 50-c). Each of the parties is to make proper assignments to the Creamery Company of all patents (p. 52-a), and a suit by the Owatonna Manufacutring Company against the Fargo Company, based on the October, 1893, agreement (see Exhibit B-9, p. 90) is assumed by the Creamery Company as respects the Fargo Company's liability (p. 52-b). Three of the seven directors are to resign and in their place A. H. Barber, F. B. Fargo and H. H. Curtis are to be elected (p. 53-a).

A board of arbitrators as to values of assets is appointed (p. 55-b); patents issued on pending applications are to be assigned to the Creamery Company (p. 55-c), and at least one-half of the net profits of the business are to be paid and distributed each year to the shareholders, unless the Board by unanimous vote otherwise determines (p. 57). There are other clauses adjusting various details. All the provisions of the agreement (including the dissolution of the corporations) were carried out (pp. 232-c, 233-c, 256-b, 270-a), except only that the proposed issue of bonds (p. 53-c) was never made (pp. 233-a, 270-b).

When this agreement was made the rivalry between competiting concerns was so strong and the prices so low (p. 280-b) that the expenses ate up the profits (p. 204). The competition—"intense" and "ruinous"—(p. 303-a) centered in the patented articles called "specialties" in the testimony. Among these specialties were combined churns and butter-workers (p. 807),-devices intended to perform both churning and butter making in a continuous operation by a single apparatus (p. 296). The Fargo Company had one such device,-the Victor (p. 278-a and b); the Cornish, Curtis & Greene Manufacturing Company had another,-the "Wisard" (p. 249); and the Creamery Company was selling the Disbrow. There were many others on the market (pp. 297-c, 289-a, 213-c, 318-a, 314). In the business of furnishing complete outfits,-plants ready for operation (p. 286-a)—the main competition was between the Creamery Company, the Fargo Company and Cornish, Curtis & Greene Manufacturing Company (pp. 278-c, 284-a, 286-a and b). If the salesman could induce the customer to specify the particular patented churn that his house was handling, the contract would be likely to go to him (p. 307-a and b). Houses not in control of such a

churn were under a handicap (pp. 287-a, 330-c, 347).

The Pargo suit already mentioned (a patent infringement case by the Owatonna Manufacturing Company against the Pargo Company) was then pending (p. 219-b) and a large part of the testimony had been taken (pp. 284-a, 52-b). A number of other suits had also been commenced (p. 283-c).

Before the agreement the discussion among the parties was that if they "could eliminate competition and also stop "the law suits which were going on at that time and were "very expensive " " it would be a good thing." If they "could eliminate that and also stop the Federal litigation" among themselves (p. 283-b). They considered that they had a better churn than any of their competitors (pp. 312-a and b, 314-c). The Victor and Disbrow machines constituted about ninety per cent (p. 314-c) of those in use in the Dakotas, Iowa, Minnesota and Wisconsin (p. 315-b), the Disbrow being in special favor (p. 298-c). The Western makes of churns were not used to any great extent in the East (p. 300-b), and the parties to the 1608 agreement knew little or nothing about Eastern machines (pp. 313-b, 314-a).

As to competition, the evidence is confined to Minnesota, North and South Dakota, Wisconsin and the Northern part of Iowa (p. 300-c), although Kentucky, Nebraska and Illinois are referred to (p. 278-c). Before the 1898 agreement, the competitors in this territory included not only the parties to it, but Mower & Harwood, J. G. Cherry & Company, A. J. Cushman & Company, Hency & Campbell, D. H. Burrill & Company, and a house at Sioux Falls, South Dakota, another at Toledo, Ohio, and eight or ten small local houses (pp. 252-c, 279-a, 315-c). Burrill and Mower & Harwood were large concerns (p. 316-a and b).

After the agreement Burrill & Company, the Cherry Company, Heney & Campbell and Mower & Harwood continued to be in competition (p. 315-c). A. J. Cushman & Company were also competitors until that concern was bought out by the Creamery Company in the apring of 1899 (p. 360-a). According to one witness (Frink) competition was reduced to about one-third from what it was before in Wisconsin, Minnesota and nearby States (p. 293-a), and in Wisconsin, Minnesota and the Dakotas the Creamery Company had eighty-five to ninety per cent of the trade in specialties and complete outfits (pp. 293-c, 294-a), and in the line of supplies Frink "guesses" the Creamery Company had all the business (p. 294-a). On the other hand he says that about one-third in value of things going into creameries could be bought anywhere (p. 305-c). Another witness says that "a large proportion" of creamery articles could be bought freely in the open market (p. 349-b). There were many patented articles,-weighing devices, wilk-testing devices, vats, separators, and the like, made in different forms under different patents and in competition with each other (pp. 305, 306), and many of the houses not in the agreement sold churns as well as other specialties (pp. 297-c, 298-a, 312-c, 313-a, 314). After the agreement prices were raised from ten to thirty-five per cent (p. 289-b) on the patented articles owned by the Creamery Company by reducing discounts that had been granted before (pp. 308-b, 327-b, 328-c). There was a rise afterwards in the prices of unpatented articles during the year 1899 (pp. 328-b, 329-a) due to an advance in the price of material (pp. 340, 345). There is no evidence whether the increased price was reasonable or unreasonable, nor any evidence of any prices after October, 1899.

The purpose of this agreement was to advance the busi-

ness interests of the parties by settling and avoiding litigation pending and apprehended (p. 283) and by terminating unreasonable and ruinous competition (pp. 280-b, 303, 304, 312, 313). The Owatonna Manufacturing Company was not a party to the agreement nor connected with it in any way.

The June 1988 Agreement: By this agreement (Exhibit "B-4", p. 77) the Fargo suit, which had been assumed by the Creamery Company by the agreement of the previous February (p. 52-b) was settled. The agreement contained a stipulation of the Creamery Company that the Owatonna Manufacturing Company was "entitled to manufacture and furnish fifty-five per cent in value at list price of certain kinds of churns sold by the Creamery Company "in each year from and after the date of this contract" (p. 80-a). It was also stipulated that if the Creamery Company sold more than forty-five per cent of such machines of other makes in any year it should pay the Owatonna Manufacturing Company as damages a certain percentage on the excess in value (p. 80-b).

The April 1897 agreement did not require the Creamery Company to sell any definite amount, nor did it preclude that Company from selling like articles manufactured by itself or brought by it from others. The June 1898 agreement settled a lawsuit of considerable magnitude, and also remedied this important omission.

The Infringement Suits of which Plaintiffs Complain: The Creamery Company in its suit (Exhibits "E-1" to "E-3" of the complaint (pp. 124-147) counted on three letters patent, and claimed that the defendants there (the plaintiffs in this suit) were infringing each of these patents by using them at Owatonna and elsewhere in Minne-

sota and throughout the United States in the manufacture of combined churns and butter-workers (pp. 130-c. 181-a). The interloctutory decree in that case (Exhibit "1" of this defendant's answer (pp. 161-163) adjudged that each of these patents was good and valid; that the defendants in that suit (the plaintiffs here) had infringed one claim of each of the earlier patents and two claims of the latest by their "manufacture, sale and use of combined churns "and butter-workers embodying the inventions disclosed "and claimed in the above identified claims of said patents" (p. 162-c). Accordingly the defendants in the equity suit were enjoined to desist "during the remainder of the life "of said patents and each thereof" from the "further "manufacture, sale or use of any combined churns and "butter-workers or material parts thereof, embodying any "of the inventions disclosed in the above identified claims "of said patents" (pp. 162-c, 163-a). The business thus enjoined was the manufacture and sale of combined churns and butter-workers by the plaintiffs in this suit at the manufacturing plant of the Fanning Mill Company at Owatonna (pp. 516, 553, 557-a). An appeal from the decree to the Court of Appeals was dismissed for want of proseuction (pp. 152-b, 198-b.).

The suit of the Owatonna Manufacturing Company (Exhibits "D-1" to "D-4", pp. 103-124) was based on an infringement of letters patent of the United States numbered 585,100 for an improvement in combined churns and butter-workers (p. 105). After hearing it was decreed that this patent was "void for lack of invention in view of "the priar art as to all claims thereof counted by the defendant in this case,—claims 3, 5 and 6 of said patents" (p. 124).

The Claimed Joinder by Defendants in the Infringement Buits: The two infringement suits were begun on the same day,-July 16th, 1904 (p. 518-a). The complainants appear by the same attorney (p. 518-b). Other circumstances claimed by plaintifs to show a joinder of both defendants in both suits are a conversation between Mr. Paul, complainants' attorney, and Mr. Williamson, defendants' attorney (p. 540); a letter and a telegram by Mr. Paul to Mr. Williamson (pp. 572, 573); consultations between the representatives of both defendants in taking the testimony (pp. 541-c, 547-c, 548-c) and a remark made by Mr. Paul (p. 547-a). Both suits related to the same art -combined churns and butter-workers-and evidence in each was so likely to be applicable to both that before the evidence was taken a stipulation was made that the testimony in one cause might "be read and used in the other "cause so far as competent and pertinent thereo, with the "same force and effect as if taken directly therein" (p. 574-a). An assignment of costs (Exhibit E-4, p. 147) made in January, 1908 (p. 149) is also claimed as a circumstance in this connection.

The Alleged Threats: At about the time the suits were begun the agents of the creamery Company told intended purchasers and users of the Virtue churn that they would have trouble with the Fanning Mill churn (pp. 354, 355); that it was an infringement of the Disbrow churn (p. 447); that a suit had been begun or would be begun against the Fanning Mill Company for infringing the patents of the Oreamery Company; and that the creameries using the Virtue or Fanning Mill churn would be sued (pp. 472, 474, 481-a, 486-b, 487-a and b). At this time there were rumors and common talk in the trade that such suits would

be or had been begun against the Fanning Mill Company and purchasers of its churns (pp. 474-b, 483-a, 485-c, 486-b). In March or April, 1905 (pp. 451-b, 453-a, 463-a), after the suits were begun, notice that suits were pending and that users would be held liable was given by the attorney for the defendants to an agent of the Fanning Mill Company in Michigan (pp. 453-c, 457-b, 464). When the litigation became known to the trade prospective buyers either refused to buy the Fanning Mill churn or demanded a guaranty against infringement suits (pp. 457-a, 472-a, 474, 479-c, 509-a).

The Conduct of the Creamery Company after February, 1898. The purchase of other concerns: In the spring of 1899 the Creamery Company bought out the Cushman house in Waterloo, Iowa (p. 360-a) for \$46,000 (pp. 362-a, 366-b). The Cushman concern was a competitive house (p. 367-c). In October, 1905, the Creamery Company (p. 373-a) bought out the merchandise (p. 275-a) of E. W. Ward & Company for \$14,000 to \$16,000 (p. 374-a), that Company being then in competition with the Creamery Company (p. 374-a). The business was continued in the name of E. W. Ward & Company until September, 1906, when the goods were transferred to the Creamery Company's place of business in Minneapolis (p. 373-a). These two concerns-Cushman and Ward-were the only competitive concerns acquired. In 1904 or 1905 the Creamery Company bought out the Fremont Butter Tub Company, manufacturing butter tube at Rock Island, and has since carried on the business of manufacturing butter tubs at Rock Island in the name of the Fremont Company (p. 271-b). In 1903 or 1904 it bought out Cornish, Sturgis & Burn, doing business in St. Paul, Chicago and Kansas

City (p. 272-a) in order to do away with some patent litigation (p. 238-c), and in 1906 it bought out the Stoddard Manufacturing Company in Rutland, Vermont (p. 271-c). Cook & Reed, having a place of business at Des Moines, was also bought out (p. 271-a). In 1900 or earlier (p. 511-a) the Creamery Company had an agreement with Burrill & Company for the exclusive sale of Simplex churns in some Western territory on royalties (pp. 505-c, 506) for a year (p. 506-a) or perhaps two years (p. 511-a).

The Use of Other Names: The business of the Fargo Company was carried on by the Creamery Company for about three years ander the name of the Fargo Company and then the name was changed to the Fargo Creamery Supply House. Under this latter name the Creamery Company has conducted the business at St. Paul and Lake Mills, Wisconsin, since 1900 or 1901 (pp. 217-c, 235-c, 378-c, 379-a). It has also since the 1898 agreement conducted the business at Fort Atkinson, Wisconsin, in the name of Cornish, Curtis & Greene Manufacturing Company (p. 235-a), and for about a year continued to use the name of Cornish, Curtis & Greene Company in St. Paul (p. 235-b). The Creamery Company used the name A. H. Barber & Company in carrying on the business bought from A. H. Barber & Company until September, 1903 (pp. 150-c, 256-a).

Until 1903, the salesman from the Fargo house and from the Minneapolis house (the latter conducted in the name of the Creamery Package Manufacturing Company) at times made separate but in reality non-competitive bids for the same piece of machinery or work (p. 289) and would decide by lots who should put in the lowest bid (pp. 329-c, 330-a, 335-b, 337). This practice was abandoned as early as 1903.

Since that time it has not been used, and purchasers have been informed and the fact has been generally known that the Fargo house is a branch of the Creamery Company (pp. 385-c, 386-a, 387).

On the trial of the action the Circuit Court directed a verdict for the defendants, and the judgment entered in pursuance of this direction was affirmed by the Circuit Court of Appeals.

#### ARGUMENT.

We shall consider first the decision of the Circuit Court of Appeals, and shall then take up chronologically, so far as possible, the questions of fact, considering in connection with the facts such matters of law as appear to be applicable to them.

#### TOPIC I.

# The Judgment of Affirmance.

The opinion of the Circuit Court of Appeals, affirming the judgment of the Circuit Court in favor of defendants is fully sustained by the facts and by the law. The Circuit Court of Appeals held:

1. That the 1897 contract between the two defendants was not in restraint of trade, nor an attempt to create a monopoly (179 Fed., 117-18).

By this contract the Owatonna Manufacturing Company made the Creamery Company its exclusive sales agent for all churns manufactured by the former Company (pp. 69-73). The facts as to the four contracts (including this one) made in April, 1897, are fully stated in the decision

of the Court of Appeals. We add only the page references from the printed transcript.

"The record discloses that on the 2d of October, 1893. "by an instrument in writing, Reuben B. Disheow and "Darius W. Payne, then owners of letters patent numbered "490.105, for a consideration, assigned said petent and the "exclusive right to manufacture and sell throughout the "United States and Territories the Disbrow combined "churn and lutter-workers covered by the patent, and "also 'all subsequent patents for improvements that may "be made to it to the Owatowna Manufacturing Company' "(p. 90-b); that thereafter the Disbrow Manufacturing "Company, a corporation organized under the laws of Min-"nesota, Reuben B. Disbrow being its President and Darius W. Payne its Secretary, began the manufacture "of certain churns called the Winner or New Disbrow "(pp. 416-b, 419-a, 419-c, 420-a, 441-c). The defendant the "Owatonna Manufacturing Company claimed that this "churn was being manufactured under improvements "which were patented by Reuben B. Disbrow after the 8 agreement, and therefore belonged to the Owatonna "Company as subsequent patents for improvements (pp. \*399-a and b, 442-b). At this time the defendant the "Creamery Company had a contract made in October, 1896, with the Disbrow Company, for the sale of the Winner "churn (pp. 417-a, 420-b). It had also advanced money "to the Disbrow Company and held a mortgage upon its "plant for \$800 (pp. 99-c, 420-b).

"Idigation arose with respect to the rights of the parties under the agreement of 1893, and several suits were pending in relation thereto (pp. 389-c, 396-a and b, 397-a and c, 399-a, 401-b and c, 402-a, 416-418-b), when, in "April, 1897, a settlement was effected by the execution of

"four instruments. One (Exhibit 'B-9', p. 89 dc.) was a "contract between the Disbrow Manufacturing Company "and the Owatonna Manufacturing Company, in and by "which the rights of all parties under the October, 1893, "agreement were mutually released (pp. 91, 92), the suits "were settled (pp. 90, 95-a), and the Disbrows sold their "patents (p. 91-a), machines, tools and patterns (p. 94-c) "to the Owatonna Manufacturing Company and retired "from the churn business during the life of the patents "(p. 91-b). Another was an assignment of the Disbrow "patente (Eshibits B-10', p. 97). A third was a contract "between the Owatonna Manufacturing Company and "the Creamery Manufacturing Company, by which the "Creamery Package Manufacturing Company was made "sales agent for all the churns manufactured by the "Owatonna Manufacturing Company (Exhibit 'B-1', p. "69). The fourth was a contract between the Dis-"brow Manufacturing Company and the Creamery Pack-"age Manufacturing Company (Exhibit 'B-11', p. 99), "wherby the agreement of October, 1896, between these "parties was released and discharged and the mortgage "on the plant of the Disbrow Manufacturing Company was "satisfied (p. 100-c), the Creamery Package Manufacturing "Company agreeing to pay to the Disbrows royalties there-"after falling due from the Owatonna Manufacturing "Company (p. 101). These four contracts were executed "at the same time, and, as shown by the recitals, were part "of a single transaction (pp. 73-b, 91-a, 93-a, 98-a, 100-a).

"The purpose of these instruments, as disclosed by the "instruments themselves, was to settle pending litigation "and all matters concerning which the parties were at "variance (pp. 417, 418-a, 420-c, 421-a), and to cause the "Disbrow Company to discontinue the manufacture of

"Charms (p. \$28-c) under the patents, which the Owntonna "Manufacturing Company insisted belonged to it" (p. 428-c).

The references to the printed record show beyond question that each of these statements is in full accord with the undisputed evidence.

There is a further review of the evidence on pp. 29 of sog of this brief.

As respects the law applicable to these conceded facts, the Court says:

"This contract" (contract of April 19, 1897) "was not "a contract in restraint of trade, nor was it an attempt to "create a monopoly." " " Even if it can be said that it "incidentally or indirectly tended to restrain competition "by giving the Creamery Package Manufacturing Company "the exclusive right to sell its product, it would not violate "the statute" (179 Fed., 117).

"As already indicated, we do not think the contract be tween the Owatonna Manufacturing Company and the Greamery Package Manufacturing Company, giving the Greamery Company the exclusive sale of the Manufacturing Company's output, tended to suppress competition, "The Manufacturing Company had the right to select "its customers, and to sell and to refuse to sell to whom-soever it chose (Whitwell v. Continental Tobacco Company, 126 Fed. 464, 60 C. C. A. 290, 64 L. R. A. 689), and "the provision making the Creamery Company its sole "aniss agent was a usual and reasonable method of providing for the disposition of its product. The effect of "this contract, if, indeed, it had any effect, upon interstate for international commerce, was only incidental and in-fidirect. The sole purpose of the contract as we view it,

"was to settle pending and threatened litigation, and to "secure to the Owatonna Manufacturing Company the "right to manuscrure and dispose of its product under "certain patents, and to foster its trade and increase its "business. In order to condems an agreement as void "under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international consmerce. Cincinnati &c. Packet Company v. Bay, 200 U. "S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428" (179 Fed. 118).

This position is amply sustained by the authorities:

Hopkins v. United States, 171 U. S. 578, p. 592;

United States v. Joint Traffic Association, 171 U. 8, 505, p. 568;

Anderson v. United States, 171 U. S., 604, p. 615;

Addyston Pipe & Steel Co. v. United States, 175 U. B. 211, p. 229;

Northern Securities Co. v. United States, 193 U. S., 197, p. 331;

Field v. Barber Asphalt Paving Co., 194 U. S., 618, p. 623;

Standard Oil Co. v. United States, 221 U. S., 1, p. 86.

We quote from some of these cases:

"The contract condemned by the statute is one whose "direct and immediate effect is the restraint upon that kind "of trade or commerce which is interstate." " " There "must be some direct and immediate effect upon interstate "commerce in order to come within the Act."

Hopkins v. United States, 171 U. S., 578, p. 592.

"The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for "the purpose of promoting the legitimate business of an in-"dividual or corporation, with no purpose to thereby affect "or restrain interstate commerce, and which does not "directly restrain such commerce, is not, as we think, cov"cred by the act, although the agreement may indirectly
"and remotely affect that commerce. We also repeat what
"is said in the case above cited (Hopkins v United States,
"171 U. S. p. 600), that 'the act of Congress must have
"a reasonable construction or else there would scarcely
"be an agreement or contract among business men that
"could not be said to have, indirectly or remotely, some
"bearing upon interstate commerce, and possibly to re"strain it."

United States v. Joint Traffic Association, 171 U. S. 505, p. 568.

"As is said in Smith v. Alabama, 124 U. S. 456, 473: "There are many cases, however, where the acknowledged "powers of a State may be exerted and applied in such "a manner as to affect foreign or interstate commerce "without being intended to operate as commercial regula-"tions." The same is true as to certain kinds of agree-"ments entered into between persons engaged in the same "business for the direct and bona fide purpose of properly "and reasonably regulating the conduct of their business "among themselves and with the public. If an agreement "of that nature, while apt and proper for the purpose thus "Intended, should possibly, though only indirectly and un-"intentionally, affect interstate trade or commerce, in that "event we think the agreement would be good. Otherwise "there is scarcely any agreement among men which has "juterstate or foreign commerce for its subject that may "not remotely be said to, in some obscure way, affect that "commerce and be therefore void."

Anderson v. United States, 171 U. S., 604, p. 615.

"ate interstate commerce comprises the right to enact a "law prohibiting the citizen from entering into those pri"rate contracts which directly and substantially, and not "merely indirectly, remotely, incidentally and collaterally "regulate, to a greater or less degree, commerce among the "States."

Addyston Pipe & Steel Co., 175 U. S., 211, p. 229.

The result of the authorities is well stated by Judge Sanborn in—

Union Pacific Coal Co. v. United States, 173 Fed., 757:

"If the necessary effect of a combination to engage in
"or conduct interstate or international commerce is but
"incidentally and indirectly to restrict competition therein,
"while its chief result is to foster the trade and to increase
"the business of those who make and operate it, it does
"not fall under the ban of this law."

2. That the agreement of June, 1898, between the two defendants was not in violation of the Sherman Act (179 Fed., 118).

As to this agreement, the Court says: "The same is true" (that is, the statements already made in the opinion concerning the 1897 agreement) "of the agreement between "the same parties of June 4, 1898, which was an agreement "for the settlement of certain litigation, and provided "that the Owatonna Manufacturing Company should have "the right to manufacture 55 per cent of the total yearly "sales made by the Creamery Company or be compensated "In damages. This contract was merely supplemental to "the contract of April 19, 1897, which contained no pro"vision as to the amount of sales of the Owatonna Manu-

"facturing Company's product should be made by the "Creamery Company, and this omission was suplied by "this contract. Its only effect was to foster the interests "of the Owatonna Manufacturing Company, and did not "affect competition" (179 Fed., pp. 118-19).

The facts are simple and undisputed. In June, 1898, there was pending a suit by the Owatonna Manufacturing Company against the Fargo Company, based on the rights of the former Company under its agreement of October. 1893 (pp. 283-c, 299). By one of the provisions of the "1898 General Agreement" the Creamery Company undertook to indemnify the Fargo Company against this suit (p. 52). The Creamery Company was, therefore, in fact a defendant in the suit which the Owatonna Manufacturing Company had against the Fargo Company. The June, 1898, agreement settled this suit, and also made the provision that the Owatonna Company should be "entitled to manufacture and furnish 55 per cent in value at list "price" of certain kinds of churns sold by the Oreamery Company "in each year from and after the date of this "contract" (p. 80-a). If the Creamery Company failed to comply with this provision, it was to pay the Owatonna Manufacturing Company a certain percentage "of the "excess in value above 45 per cent of said ma-"chines of other makes sold by it in each year" (p. 80-b). The April 1897 agreement did not require the Creamery Company to sell any specified number of churns, and did not prevent it from selling those not made by the Owatonna Manufacturing Company. The prevision entitling that Company to furnish a definite percentage was a reasonable one, which might well have been made a part of the April 1897 contract. Having been omitted

from that contract, it was supplied in June 1898 as a part of the transaction by which the Fargo litigation was settled. It certainly had no influence of any kind on competition.

The agreement is discussed further on pp. 37 and 38 of this brief).

3. That even if the Creamery Company were assumed to be a party to an unlawful combination in restraint of trade, this would not deprive it of its right to sue for infringement of its patents (179 Fed., 119).

The Court says: "We may assume, however, for the pur-"poses of this case, without deciding the question, that "It was a contract in violation of the statute. We then "have a case where two suits are brought, one by a party "to a lawful agreement, the other by a party to an unlaw-"ful agreement, for the infringement of patents owned by "them respectively, and where both parties were doing "nothing more than exercising their legal rights. The "mere fact that the Creamery Package Manufacturing "Company was a party to an unlawful combination would "not deprive it of the right to sue and recover damages "against an infringer of patents owned by it, or to bring "suit if it believed the patents were being infringed. As "was said in Strait v. National Harrow Company (C. C.). "51 Fed. 819, the owner of a patent having a right to bring "suit for its infringment: "The motive which prompts "him to sue is not open to judicial inquiry, because, having "a legal right to sue, it is immaterial whether his motives "are good or bad, and he is not required to give his reasons "for the attempt to assert his legal rights.' Consolly o. Union Sewer Pipe Company, 184 U. S. 540, 22 Sup. Ct.

"431, 46 L. Ed. 679, and cases there cited."

This position is amply sustained not only by Connolly v. Union Sower Pipe Company, supra, but by other decisions of this Court as well:—

Fritts v. Palmer, 132 U. S. 282;

Dickerman v. Northern Trust Co., 176 U. S. 181, pp. 190, 192;

South Dakota v. North Carolina, 192 U. S. 286, p. 311; Harriman v. Northern Securities Co., 197 U. S., 244, pp. 291, 295, 298, 299;

In re Metropolitan Railway Receivership, 208 U. S., 90, p. 111,

and by many cases in the Federal and State Courts, collected in the annotation to

International Harvester Co. of America v. Clements, 163 Mich. 55: in 30 L. R. A. (N. S.), 580. (This point is discussed further under "Topic" V.)

4. That none of the contracts contained any provisions for bringing action against alleged infringers of patents for the purpose of driving them out of business (179 Fed., 119).

This conclusion of fact is amply sustained by the record. The 1898 General Agreement contained no provision at all in regard to suit for the prosecution of infringers. In the contract of April, 1897, between defendants (p. 71-b), and in the contract of the same date between the Disbrow Associates and the Owatonna Manufacturing Company (p. 94-a), as also in the contract of June, 1898 (p. 80-c), there were stipulations as to suits against infringers; but obviously they have to do only with unauthorised persons who might thereafter by design or inad-

vertence use the patented devices. They did not contemplate suits for the purpose of driving any one out of business.

On this subject the Court says: "The contract of Feb-"ruary 24, 1898, but the Creamery Company and "other concerns and individuals, contained no provision "for the bringing of actions against alleged infringers of "its patents for the purpose of driving them out of busi-"ness, and there was certainly nothing of the kind in any "of the contracts made and entered into between the de-"fendants" (179 Fed. 119).

(These stipulations are further reviewed on pp. 39 et seq.)

5. That the evidence did not warrant the jury in finding any agreement or conspiracy between the defendants to bring the patent suits for the purpose of driving the plaintiffs out of business (179 Fed. 119).

The Court says: "The mere fact that the two infringe"ment suits were brought upon the same day and the
"defendants were represented by the same counsel does
"not show, or even tend to show, that they were brought
"for any other purpose other than the enforcement of the
"legal rights of the owners of the patents. It falls far
"short, it seems to us, of establishing an agreement or
"conspiracy between these defendants to bring these suits
"at the same time for the purpose of driving the plaintiffs
"out of business, and after a thorough and patient exam"ination of the record we think the Circuit Court was duly
"justified in holding that there was no evidence offered at
"the trial 'which would warrant the jury in findig that any
"agreement of that kind existed'" (179 Fed. 119).

The conclusion of the Court is amply within the evi-The suits were brought on the same day by the same attorney (p. 518-a and b). For the rest the plaintime rely upon immaterial matters: In a conversation between the attorneys, Mr. Williamson, appearing for the defendants in the two suits, advised against the suits because "We would simply bust up all these patents and "throw the whole thing open to the public" (p. 540). In A letter from Mr. Paul to Mr. Williamson he stated that he would consult with his Chicago client, and subsequently telegraphed from Chicago that he would proceed with both suits (Exhibits "6" and "7", pp. 572-8). While the testimony was being taken Mr. Williamson observed consultations between the representatives of the two defendants, and, according to his view, the testimony then being taken would apply only to one case (p. 541-c); but (since both suits had to do with the same art) it was stipulated early in the proceedings that the testimony in either case wight be used in the other "so far as competent and per-"tinent thereto, with the sume force and effect as if taken "directly therein" (p. 574-a); and Mr. Williamson concodes that (in spite of his judgment to the contrary) the Court might have decided afterwards that the evidence then being taken in the one case was also "competent and tinent" in the other (pp. 547-c-548-a). The Exhibits were stored in the warehouse of the Creamery Company (p. 524). An agent of that Company once said to Virtue at Owatonna: "We think we own the creamery supply "business around here" (p. 519-c); and the costs in the amery Company case were assigned by the Creamery Company to the Owatonna Manufacturing Company about a year after the decrees were entered in the two infringement cases (p. 149).

The record amply sustains the conclusion of the Court that the jury would not be warranted in finding the existence of an agreement to bring the two suits "for the pur"pose of driving these plaintiffs out of business."

(The evidence is further discussed under Topic IX.)

6. That the owner of a patent may notify infringers of his claims and warn then that unless they desist, suits will be brought to protect him in his legal rights. \* \* \* The only limitation on the right to issue such warnings is the requirement of good faith (179 Fed. 120).

This position has ample support in the authorities cited in the opinion:

Kelly v. Ypsilanti Dress Stay Manufacturing Co. (C. C.), 44 Fed. 19, 10 L. R. A. 686;

Computing Scales Co. v. National Computing Scale Co. (C. C.), 79 Fed. 962;

Farquhar Company v. National Harrow Co., 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755;

Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827, 58 C. C. A. 168;

Warren Featherbone Co. v. Landauer (C. C.), 151 Fed. 130;

Mitchell v. International &c. Co. (C. C.), 169 Fed. 145;

30 Cyc., 1054.

That there is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution of the infringement suits (179 Fed. 120).

Just before the suits some agents of the Creamery Company notified intended purchasers that they would have trouble with the Fanning Mill churn (pp. 354, 355); that that churn infringed the Disbrow churn (p. 447); that a suit had been or would be brought against the Fanning Mill Company for infringement of the Creamery Company's patents, and that users of the Fanning Mill churn would also be liable to suit (pp. 472, 474, 481, 486, 487). After the suits were begun a notice was sent by the attorneys for the plaintiffs in the infringement suits to an agent of the Fanning Mill in Michigan, warning him that users of the Fanning Mill churn would be held liable for infringement (pp. 458, 457, 464).

This constitutes all the evidence on the subject and fully supports the conclusion of the Court that the warnings were in good faith and were promptly followed by suits.

(This point and point 6 are further considered under Topic VIII.)

It is clear from this review of the record that each fact stated by the Court is amply supported by the evidence; that each conclusion of law is in accordance with the decisions of this Court and other Federal tribunals, and that the record fully authorises the judgment which the Circuit Court of Appeals entered.

# TOPIO II.

## The Owntonna Manufacturing Company Agreements.

Under this Topic we shall discuss more fully the evidence sustaining the conclusion of the Court of Appeals that the agreements made by the Owatonus Manufacuring Company with the Creamery Company did not violate the Sherman Law. The agreements referred to are those made in April, 1897 (Exhibits "B-9", "B-10" and "B-11"—pp. 89-101—and "B-1"—p. 69) and one made in June, 1896 (Exhibit "B-4"—p. 77).

## 1. THE 1897 AGREEMENTS HAD TO DO SOLELY WITH THE SETTLEMENT OF LITIGATION THEN EXISTING OR APPREHENDED.

In April, 1897, a number of suits were pending between the Owatenna Manufacturing Company and the Dishrows and others arising out of an agreement between them (pp. 896, 897, 899, 401, 402, 416-b, 419-a, 420-a, 441-442). The contents of the agreement are recited in one of the co tracts (Exhibit "B-9", p. 90). It is there stated that "on "the 2nd day of October, 1883, by an instrument in writing, "said Reuben B. Disbrow and said Darius W. Payne, who were then the owners of said letters patent No. 400,105, "and of all rights thereunder, granted and assigned to "said second party the exclusive right to manufacture and "sell throughout the United States and the territories "thereof, the Disbrow Combined Churn and Butter-worker, "under said patent No. 490,105, and all subsequent patents "for improvements that may be made to it for certain con-"siderations set forth in said assignment."

The witness Ames—the president of the Owatonna Manufacturing Company until July, 1898 (p. 388'a)—gives orally the principal provisions of this agreement (pp. 898-c, 401-c, 402-c, 408-c, 416-c). It became a fruitful source of litigation and expense (p. 442-c) and caused the relations between the officers of the Owatonna Manuafeturing Company and the Diabrows to become so strained that they refused to have any personal dealings with each other (pp. 404-b, 419-b, 442-b). The Disbrows were then manufacturing a combined churn and butter-worker called the "Winner". The claim of the Owatonna Manufacturing Company was that this churn was being made with improvements invented by one of the Disbrows after the October, 1893, agreement, and that these improvements were its property (pp. 399-a, 399-b). There were then pending three suits -one by the Owatonna Manufacturing Company against a local creamery that had purchased a Winner churn made by the Distrow Company (p. 416-b), another by the Disbrows and their associates against the Owatonna Mannfacturing Company to set aside the agreement (p. 4194), and a third by the Owatonna Manufacturing Company against the Disbrows and others to enforce it (pp. 420-a, 441-c. 442). There was incidentally an injunction to prevent the Owatonna Manufacturing Company from receiving certain mail (p. 442-c).

"At this time the Creamery Company had an agreement with the Dishrow Company (then a partnership) made on October 12th, 1896, by which the Dishrow Company undertook "to manufacture and sell" to the Creamery Company "certain combined churns and butter-workers" and appointed the Creamery Company its "exclusive sales "agent for all combined churns and butter-workers manufactured by it" (Exhibit "B-11," p. 99-c). It appeared also that the partnership had by the same agreement "mertenged their manufacturing plant, machinery and

"stock" to the Creamery Company (p. 99-c). Under this agreement the Creamery Company was then selling the Winner churn (pp. 417-a, 420, 431-a).

The Creamery Company was interested in a high degree and justly in the litigation by reason of its contract of the previous October with the Disbrow Company. If the Owatonna Manufacturing Company should succeed in its suit against the user of the Winner churn, or in its suit against the Disbrows for the enforcement of the 1893 agreement, the Creamery Company's sales contract with the Disbrows would be without value, and in the meantime the Creamery Company's business in the Winner churn would either cease or be carried on at a marked disadvantage.

That the intention of the parties was to compromise their difficulties and foster and forward their own trade is conclusively shown both by the oral evidence and by the contracts actually executed. In the oral testimony, Mr. Ames. ays at first that the proposition of Mr. Gates, of the Creamery Company, was to make "a settlement in some way with "the Disbrow Manufacturing Company \* \* \* and in that "way eliminate the competition that at that time existed between the Owatonna Manufacturing Company and the "Disbrow Manufacturing Company" (pp. 389-b, 391-a, 291-c). The litigation then existing was not at first clear in his memory (p. 396-c). After it was revived by reading from Exhibit "B-9" (p. 90), he says that the settlement proposed was of "the litigation and the acquiring of-well "-the business that they" (the Disbrow Company) "spere "then doing that we considered belonged to us" (p. 402-a). Gates' proposal finally was to "control trade" rather than to eliminate competition (p. 402-c). At the end Mr. Ames then makes the situation clear by a re-staement: "The Creamery Package Manufacturing Company were selling What Winner churn, and or I believe, and did at that time, It was being manufactured contrary to the rights owned By the Owatorna Manufacturing Company under the erms of that contract made in 1888" (the October, 1883, contract) "with the Disbrow Manufacturing Company, or "Distrow and Payne" (p. 408-b). The interest of the Greamery Company was in the sale of the Winner churu se manufacture and sale the Owatonna Manufacturing Company were seeking to have stopped by a suit that had then been brought (p. 403-b). He is then asked this question: "According to your view there was then so compo-Milion between the Disbrow Company and the Owatonna "encopt such as arose out of what you asserted was the Storongful act of the Disbrow Manufacturing Company newsfacturing and selling the Winner church". His enswer is: That is as I understand it" (p. 463-c).

The Disbrows also give oral testimony on this subject. According to Reuben, what Gates said was this: He Swanted to see if we can't get together and have this thing "settled and have all this litigation stopped and a new "arrangement made so that the whole thing shall be run "under one head and under one control. In that way." he mid, "they will control the whole churn business" (p. \$10-b). Mr. Gates brought up the question as to having at matter (the October, 1898, agreement) settled (p. 417-c). "He was going to settle the whole thing" (the litigation and the prior contracts) (p. 418-a); and as a result the October, 1803, agreement with the Owstonia unfacturing Company, the October 1806 agreement the Creamery Company, and all litigation was settled everything was settled—everything was settled and eut" (p. 421-4).

Levi Distroy mays that the proposition made by Mr. Gates was this: "He wanted to settle up all litigation that "there was between the Ovatonna Manufacturing Com-Spany and the Disbrow Manufacturing Company, and all "disputes about the churn business, as he wanted to ge "the churus together, and have all of them under one head" (p. 427-c). "He said he had come there for the purpose "of settling up all this litigation, and getting the patents "all together and consolidating them; that we should set-"tle up our litigation and have everything settled and "make a contract in accordance with that, and we to stop "manufacturing our churn" (p. 428-c). "He stated that "he spanted to stop all this litigation in the churn busin "and have all these things consolidated, and we would get "a royalty on everything; that that would stop all outside "parties handling churns, and there would be less churns "on the market" (p. 428-c); "that if he could get all the "into one lump that the price of churns could be controlle "as we would have all the churns on the market practic-"ally" (p. 431-c).

There was, however, no competition that could be stopped by the proposed agreements except that from the Winner churn (p. 441-b), which the Owatonna Manufacturing Company insisted was wrongful (p. 403-b) and ought, therefore, to cease. There was some talk about the Victor patent, which, according to the two Disbrows, was to be transferred to the Owatonna Manufacturing Company (pp. 410-c, 427-c, 441-b). The reason for the transfer of the Victor patent (the Victor churn was not then on the market—221-c, 299-c—) was that Reuben Disbrow claimed to be the owner of that patent as the inventor, and was therefore justly entitled to the transfer (pp. 410-b &c., 421-c, 427-c).

The agreements than made, carried into effect the plan roposed in these preliminary negotiations. The differa between the Disbrows and their associates on the ne side and the Owstones Manufacturing Company on the other were settled by Exhibit "B-9" (p. 89). The litiration is recited and the parties declare that they are desirous of settling all differences between them and opping all pending litigation" (p. 90). They, theremake a full and complete settlement under the Octobee, 1828, agreement by a mutual release of that agreement (p. 91) and a substitution of a royalty to be paid to the Distroy Company "in place of the interest in the profits" erved under that agreement (p. 92). All suits between the parties "are to be dismissed" (p. 95), and the Disbrows seres no, to engage in the churn business "during the life "of said patents or this contract" (p. 91c). On the same day the Disbrows and their associates on the one side d the Creamery Company on the other agree (Exhibit "B-11," p. 90) that the October, 1896, agreement shall be released and discharged (p. 100). By another agreement (Exhibit "B-1," p. 69) the Owatonna Manufacturing Company makes the Creamery Company its sole sales agent (b. (0-b)) the constraint of bridge building to be a fine of

The result of the negotiations and of the contract was that a large amount of litigation was settled, and the parties were relieved from vexation and expense and were mabled to proceed with their business, freed from the burdensome handicap incident to claims and counterclaims both in and out of Court. This was recognized in Bement a National Horrow Co. (186 U. S. 70, p. 93 as "a legitimate and desirable result in itself."

2. None of the 1897 agreements was in restraint of trade.

The 1897 agreements resulted in the countion of manufacture by the Disbrow Manufacturing Company, but the right of that company to manufacture the churn that was then being made by it was challenged by the Owatonna Manufacturing Company in good faith in the proper manner—the assertion of its claim in court. The competition of the Disbrow Company was a tort from the standpoint of the Owatonna Manufacturing Company (p. 403-c). The right of the former company to compete was the very question at issue in the law suits then pending. In this there was no suppression of competition; there was merely the assertion and obtaining by the Owatonna Manufacturing Company of what it deemed to be its just dues.

The agreement made on the part of the Disbrows not "to engage in the churn or butter-worked business, either "manufacturing or selling \* \* \* during the life of said "patents or this contract" (p. 91-b) did not make the transaction unlawful. The restraint of trade was not greater than the circumstances of the transaction required particularly in view of the breach of the 1893 agreement by the Disbrows (Cincinnati & Packet Co. v. Bay, 200 U. B. 176; Shannes Compress Co. v. Anderson, 209 U. B. 423, and authorities under Topic 1, pp. 19, et seq of this brief.)

Nor did the contract between the Owatonna Manufacturing Company and the Creamery Company, giving the Creamery Company the exclusive sale of the Manufacturing Company's output, tend to suppress competition. Owners of property have "the right to select their customers, "to sell and to refuse to sell to whomsoever they choose, "and to fix different prices for sales of the same com-

"modities to different persons" (Whitwell v. Continental Tobacco Co., 125 Fed. 454, p. 461). The stipulation making the Creamery Company sole sales agent gave the Manafacturing Company an output for its product by a usual and reasonable method whose effect upon interstate and international commerce was incidental and indirect. Its sole design was "to foster the trade and to increase the business of the parties to it." In order to condemn a covariant as void under the Sherman Law its "dominant surpers" must be an interference with interstate or international trade. (Cincinnati do. Pucket Co. v. Boy, 200 U. S. 178, p. 184, and authorities under Topic I).

And the same statement may be made as to the stipulain by the Diabrows assigning to the Owatonna Manuing Company "all modifications or improvements non any of said inventions or patents or in and to any fother inventions that have heretofore or may hereafter he made or invented" by them, "relating or applicable to ig bind of combined churns and butter-workers" (p. ia). Stiplations of this kind are frequent and have aly been held to be valid: Littlefield a Perry, 21 Wal 205. They do not contravene public policy: Westnghouse do. Co. v. Chicago de, Co. (C. C., III.), 85 Fed. 186. "It is right, reasonable and just" that such contracts "abould be made and anstained": Resee do. Co. s. Fensick (C. C. A. 1st Cire.) 140 Fed. 287, p. 288. The authoricollected in the Westinghouse case and in the note 1 the Resce case in 2 L. R. A. (N. S.) 1094.

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8. The June 1898 agreement was not in restraint of trade.

On June 4th, 1898, when this agreement (pp. 77-81) was made, there was pending and had been for some time for 299-c) a suit by the Owatonna Manufacturing Company against the Fargo Company (pp. 288-c, 299). By one of the stipulations of the 1898 General Agreement the Creamery Company undertook to protect and save the Fargo Company harmless from this suit (p. 52). The settlement of that litigation was one of the considerations for the agreement. Another consideration arose out of an omission in the April 1897 agreement in that it failed to specify the amount of sales to be made by the Creamery Company. On this subject the June 1898 agreement provides that the former agreement shall remain in full force and effect (p. 80-a), and that there shall be added to it provisions th the Owatonna Manufacturing Company should "be "titled to manufacture and furnish fifty-five per cent in "value at list price" of certain kinds of churns sold by the Oreamery Company (p. 80-a), and that in case of default by the Creamery Company in respect of this stipulation, it should pay the Owatonna Manufacturing Company fixed percentage "on the excess in value above forty-five p "cent of all said machines of other makes sold by it" (p. 90 b). The agreement also required the Creamery Company not to discriminate against the Owatonna Manufacturing Company's machines, and to give to the mie of the latter "the same effort and energy as to the sale of the "machines which it may itself manufacture or may buy "from other manufacturers" (p. 80-c).

Much and repeated comment is made upon this agreement in plaintiffs' brief, on the claim that it provides for a division of the business of the world between the two partion. But the agreement is nevertheless a just and proper grangement between the parties, and is not open to the ticism made upon it, or indeed to any criticism or censore of any kind. It disposed of an outstanding litigation, d it gave the Owatonna Manufacturing Company reaable protection, such as might have properly been ineried in the primary contract, and such also as fairhaled business men would require for themselves or to others in a similar transaction. The Creamery corpany was not to cease or limit either its manufacture or makes, but on the contrary was to carry on its business is it saw fit, without discriminating against the Owatonna nufacturing Company's churus, but with the same "effort and energy" in respect of those machines as it gave to machines of other manner. And the right to furnish 55% metaring Company received was the right to furnish 55% schines of other makes. All that the Owstonna Manuof the total yearly sales of the Ovenmery Company or be temperated in damages. The agreement was designed to plish, and did accomplish, nothing except the comscentic of the lawsuit, with a rendjustment of the busiwas relations between the parties to it. It did not reduce detract from competition, and so far from restraining bads, advanced and increased it. As was said by the Court of Appeals, speaking of this provision,-"Its only act was to faster the interests of the Owatowna Manufacturing Company, and did not affect competition" (179 Fed 110). Liver to the first the state of the same of the same of

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kati Turka di kacamatan baharan di Mantan kacamatan baharan 4. THE STIPULATIONS IN THE OWATONNA MANUFACTURE ING COMPANY AGREEMENTS AS TO PROSECUTING INFERENCES WERE USUAL COVENANTS, NOT WARRANTING THE INFERENCES OF A PURPOSE TO DRIVE COMPETITORS OUT OF BUSINESS BY GROUNDLESS SUITS.

The agreement of April, 1897, between the Disbrow Manufacturing Company and their associates, as parties of the first part, and the Owatonna Manufacturing Company, as party of the second part, has the following stipulation:

"IX. The party of the second part shall have and is "given the right to prosecute in its own name all infringements of any patent or patents heretofore or hereafter "acquired by it from said parties of the first part, or either of them, whether said infringements have occurred or may "hereafter occur."

"X. In any such litigation said parties of the first part "agree jointly and severally to give to said party of the "second part, but without expense to themselves, any in-"formation or assistance that they can, and should it prove "necessary, said party of the second part is authorised to "make said first parties co-plaintiffs with itself in the "prosecution of infringers of any patents acquired by said "party of the second part from the parties of the first part, "or any of them" (p. 94).

The agreement of the same date between the defendants has this provision:

"The party of the first part" (the Owatonn Manniacturing Company) "further agrees to protect the party of the "second part" (the Creamery Company) "from all suits "for infringement of patents, or claims for damages aris-"ing out of the sales of said churns and not the fault of the party of the second part, also to defend at its own expense the validity of the patents; promptly and vigorously at tack infringers of any and all of each patents concerning Combined Churns and Butter-workers and to procure "patents on all improvements made by it or by any person "in its behalf" (p. 71-b).

In the June, 1898, agreement between these defendants it is provided:

The baid party of the first part bereby agrees to protect all patents upon combined churus and butter-workers that it now owns or those it may be easilize acquire, by prosecuting infringers thereof at its now as passe, and said part of the second part bereby agrees that its cell give to easily party of the first part only possible usfaintance in the procedulos of sect infringers, provided, all appears thereof shall be borne by said part of the first "part; and it further agrees that it will not lend its astalisance to infringers in defending against the patents owned by said party of the first part" (p. 60-c).

It is signed by counsel for the plaintiffs that these cormatter indicate an liberal combination, contrary to the sherman Act, to interfere with interestate trade of competitors by bringing proceedings has suits, and that the two intringement units by these defendants belonged to that class (Plaintiff's brief, pp. 11, 23, 24). There is, however, nothing in these stipulations justifying the plaintiff' term. The covenants are analogous to those for quiet enjoyment and for fittle in deads and leaver, and accordingly we find them in collections of forms (Jones' Legal Forms, pp. 758, 750, 741) and in contracts brought before the Jourts for adjudication. We cite a low of the many cases:

Proton v. Guldrohmidt, 21 Ped. 70.

Macon Endfling Co. c. Labourter Core Mills Co., 113 Fed. 814

Wilfley a New Br-dard Con. Co., 164 Ped. 421. Oritoher c. Linker, 169 Ped. 658.

Jackson v. Allen, 120 Mass. 64.

The Fornorook Mafg. Co. v. Barnum Wire Co., 68 Mick. 196.

Oroninger o. Paige, 48 Wis. 229.

Washburn & Moen Mafg. Co. v. Southern Fire Co., 37 Fed. 428.

The covenants may properly be called usual covenants, growing out of and justified by the relations of the parties. The patent owner proposes to give his licensee as exclusive privilege which will be invaded, diminished and perhaps rendered worthless unless infringers are "promptly and vigorously prosecuted."

But whether the covenants are usual ones or not, as that term is employed in conveyancing, there can be no is nce of any ulterior motive in making them in this furta-The Disbrows and the Owatonus Manufacturing Company to licensons, in order to secure to themselves the setume from the patents, were titly homester to see that the from which their royalties and profits accrued she t free from interlopers reaping where they had not ever and it was equally to the interests of the lie the Owatonna Manufacturing Company and the Cressury Chimpany - to be prometed in the quiet and procedure or byat of the rights to which they were entitled against the unlawful interference of strangers. There is no i ground for interring that the covenants mean anything than what their language imports—a fixing of th lies of the parties as against unlicensed and unanthor d introders. To my that they denote a joinder is an alawful conspiracy to bring groundless actions is merely to distort the meaning of words and to impose upon the parties an unlawful intent without support either in their contracts or in their conduct.

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5. THE OWATONNA AGREEMENTS HAD TO DO WHOLLY WITH MANUFACTURE, AND WERE THUS BEYOND THE PUR-VIEW OF THE SHEEMAN LAW.

Manufacturing is not interstate commerce, and the Sherman Law is inoperative against combinations which merely restrict manufacturing. This is the doctrine of the Knight case (United States v. E. O. Knight Company, 158 U. S., 1). The short facts in that case are that a corporation in centrol of a large majority of the factories of refined sugar in the United States, purchased stock in four Philadelphia refineries and thus obtained a practical monopoly of the sugar reducing business. It was held that this transaction d no direct relation to commerce between the states or oreign nations. "The fact that an article is manufactur-"ed for export to another state," says Mr. Chief Justice "Fuller, does not of itself make it an article of interstate Seammerco, and the intent of the manufacturer does not "determine the time when the article or product passes "from the control of the state and belongs to commerce" (186 U. B. 18).

The substance of the Knight ones is stated in United States v. Northern Securities Co., 120 Fed. 721, at p. 728. It is there said:

"One of these cases" (the Knight ones) "dealt only with "a combination within a state to obtain a practical mono-"poly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to "compacte among the states or with foreign nations; that "the fact that an article was manufactured for export to "another state did not make it an article of interesate com-"merce before transportation had been begun, nor nee "sarily subject it to federal control; and that the effect "of the combination then under consideration on inter-"state commerce was at most only incidental and col-"lateral. But while commenting on its previous decision "in United States v. B. C. Knight Co., the Court took oc-"casion to say, in Addyston Pipe & Steel Co. v. United "States, 175 U. S. 248, 20 Sup. Ct. 96, 44 L. Ed. 136, that, "when a contract is made for the sale and delivery of an "article in another state, the transaction is one of inter-"state commerce, although the vendor has also agreed to "manufacture the article so sold, and that combinations to "control and monopolize such transactions would be in "restraint of interstate commerce" (120 Fed. 728).

The case is followed in:

Diamond Glue Vo. v. United States Glue Vo., 187 U.

8. 611, p. 616; and

Cornell e. Coyne, 192 U. S. 418, p. 428.

Without noting the many other decisions in which this case is referred to, we add the comment by Mr. Chief Justice Fuller in Loesce v. Lawlor, 208 U. S. 274, 227. The Chief Justice there says:

"We do not pause to comment on cases such as United allettes v. Knight, 156 U. S. 1; Hopkins v. United States, at T. U. S. 578; and Anderson v. United States, 171 U. S. "804; in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain in "ferestate commercs. The object and intention of the combination determined its legality" (208 U. S. 207).

In the Lorses case the plaintiffs manufactured in Con-

ticut hat sold their product almost antirely in other plates. A combination of labor organizations attempted to compatithem to unlessing their shop, and on their refinal healthand a boycott in many states against their proand. The plan of the beycotters was to induce members of tries anions by threats and intimidations not to buy allers hats manufactured by plaintiffs, and at the time to induce the retailers by like threats and inaldetion to came from dealing in plaintiffs' goods. By means they caused the plaintiffs to lose "many orders d contoners." The object and necessary result of the sales, was to prevent interestate sales, and thus comthe manufacturers to comply with the demands of the unions. As stated in the opinion, the purpose of the unions was "not murely to prevent plaintiffs from manu-"Including articles then and there intended for transports-"tion beyond the state, but also to prevent the vendees from "reselling the hats which they had imported from Con-Specifical, or from further negotiating with plaintiffs for "the purchase and inter-transportation of such goods from "Connecticut to the various places of destination" (208 U. C). The combination was held to be in restraint of interstate trade within the meaning of the Sherman Law. The reason is succinctly stated by Mr. Chief Justice Faller:

"If the purposes of the combination were, as alleged, to "prevent any interestate transportation at all, the fact that "the means operated at one end before physical transports" flow communiced, and at the other end after the physical "transportation ended was immutarial" (208 U. S. 201).

The distinction between the two cases may be thus statoff: In the Leave code, while manufacture was involved, the combination restraining interestate commerce by preventing the purchasess of the manufactures product both from re-selling what they had purchased and from purchasing in the future like products in interstate commerce. On the other hand, the Knight case had to do with manufacture alone, and as to the point that manufacture is not interstate commerce the case stands unquestioned. Indeed that case was little more than a reaffirmance of previous decisions—notably Coe v. Brrot, 116 U. B. 517, and Kidd v. Pearson. 128 U.S. 1. In the former case it was held that taxation of goods produced in a state but intended for transportation to another is not a prohibited burden on interstate commerce. In the Kidd case it was held that the interstate commerce clause of the Constitution was not violated by a state law prohibiting the manufacture of intoxicating liquors within its limits, although the manufacturer intended to transport them to other states when manufactured.

6. THE OWATONNA AGREEMENTS HAD TO DO WHOLLY WITH FATENTED ARTICLES AND WERE THUS BEYOND THE PUR-VIEW OF THE SHERMAN LAW.

The Sherman Law is not violated by an agreement restraining trade in patented articles, unless the conditions imposed are "in their very nature illegal." This is determined in Bement v. National Harrow Company, (188 U. S. 70, p. 91.) The license contracts construed in that case contained provisions fixing the price at which patented harrows should be sold by the licenses. On account of this restriction (which does not appear in this case) it was held that the contract affected interstate commerce directly, and "not as a mere incident to manufacture" (p. 98). Moreover, by other stipulations the licensee agreed not to sell harrows of other makes, and the Harrow Company agreed not to license others to manufacture the particular style of harrow then used or sold by the licensee (p. 94). It was never-

to the unis of patented articles, they did not full within the inhibitions of the Electron Law. The prite restriction was "appropriate and reasonable" in view of "the nature of the property" (p. 21), and the other provisions were "reasonable" and "proper" for the protection of the interests of the nation (p. 94). "The general rule," may the Court, "is absolute treation in the use or sale of rights under the patent "may of the United States." " The fact that the conditions in the centracts keep up the somepoly or far prices them not reader them illegal? (p. 91).

Honey v. Dick Co., (234 U. S. 1, pp. 28, 30) states the

In Topic X we shall discuss our broader contention that the Eberman Law does not apply to combinations among patent owners or in patent rights.

### TOPIC III.

# The Head Council Agreement

By this agreement Exhibit "A", pp. 41-57) the Creamary Company bought the property, including the patents,
award by the Eurge Company of Lake Mills and its selling
bouse in St. Paul; the Cornich, Cartie & Greene Memater
taking Company and its selling house, Cornich, Cartie &
Greene Company and its selling house, Cornich, Cartie &
Greene Company in St. Paul; C. E. Hill & Company and
a. H. Harber & Company so the as the property of the last
tenued company related to its creamery supply and refrigtrating hadrese. The exact value of the property was to be
accreamed and payment was to be made for it, and was in
fact and do for it, in the capital stock of the Creamery Company them increased from \$400,000 to \$2,000,000." A more
detailed individe of this agreement to made in our state.

and the control of the Constant Managestuding Company and not a party to the

1. This agreement had for its purpose the prevention of multious competition in offurns and the avoidance and settlement of letigation.

Immediately before the 1898 general agreement an important factor in the creamery supply business in Minneta, the Dakotas, Winconsin and a part of lows (pp. 2) (0.c) was the combined churn and butter-worker (p. 1 b), a device protected by United States patents and designed to perform in one continuous operation by a single apparatus the conversion of cream into futter (p. 2 The Pargo Company had a number of patents on articles sed in the creamery supply business, and among others a intented combined churn and butter-worker called the "Victor" (p. 278 a & b). The Cornish, Curtis & Greens Manufacturing Company had like patented articles, includa combined churn and butter-worker called the "Wire d" (p. 249), and the Creamery Company was the seller of the Disbrow combined churn and butter-worker under the al, 1897, agreement with the Owatonus Manufacturin Company, At this time there was an active demand for splete creamery outdits; that is the crection of the plant, including the engines, boilers and patented articles i in the manufacture of cheese and butter (p. 286-a). e owners of the three combined churus just mentions was compalion in this built ... (pp. 278-, 281, 285) A concert not controlling such a caura was at a thank untage (pp. 2874, 230-c, 247), the contract being untally ives to the house whose particular chura very pictical (p. Markey). The witness Frink, who (urnishes now of the

there at that time: "In most cases they" (the purchases of the burn at that time: "In most cases they" (the purchases) would have the combined churn and butterworker open, because competition was so deres that we couldn't get them in all cases to specify either a Victor or a Wisard or Darbrow; but we could get them to specify the separator and we could get them to adopt the boiler and engine, etc., and if we could get them to adopt the churn that we were smalling we would generally get the bid. That is about the way if was

\*Q. So, as the business was carried on before February Tath, 1898, the man who got the hulde track on the churn "bad the hulde track on the bid?

"A. It was largely so, yes, sir" (p. 807-a & b).

Before March, 1898, competition was intense and rules on (p. 280-2). The rivalry was so strong and the prices so low (p. 280-5) that the expenses are up the profite (pp. 280-5). After the agreement prices were advanced on patential articles by withdrawing discounts which had been allowed before that time (pp. 289-5, 308-5, 327-5, 328-c), and later there was a further advance in prices owing to the factorize in the cost of raw material (pp. 329-5, 329-a, 346-345). The prices before the agreement were not such as to give a fair and legitimate profit (p. 804-5), and were manifestly uirreasonable. There is nothing in the record to show alother the subsequent prices some reasonable or not, nor is there may evidence at all of prices ofter Oxfober 1892 (p. 185).

Competition was not materially affected by the agreement, although the witness Frink says (6 was reduced to beat one third in Wisconsin, Minnesots and nearly states (5. 2004). Of course, the tencers who were parties to the greenest to longer competed with each other, but the

er houses remained in the field after the agre ego had been before (pp. 152-c, 278-c, 215-c). Some these houses were large ones, like Burrill and Mower a Harwood (p. 816) Many of them sold courses as se ther specialties (pp. 297-c, 298-s, 312-c, 318-s, 814). In fact a large proportion of all creamery articles could be obtained in the open market, either because they were unpatented or locause there were many patented devices of the same kind in competition with each other (pp. 305, 187). Frink says that about one-third in value of all the articles that went into a creamery were staples "that could be supplied anywhere" (p. 305-c). The rest were "specialties",—churns, vats, milk testers, separators, milk wei ers—of which there were many on the market (p. 306). The witness Holman says: "A man who wanted to fit out a creamery could have bought a large proportion of those articles from others besides creamery supply men and "from others besides churn men" (p. 349-a). The comretal argument was that there would be economy in lying from one concern (p. 349-c).

Frink tells the purpose of the agreement by reporting the discussions that took place before the agreement was made. He says: "The larger portion of the conversation was with regard to the prices on particular articles which we called specialties; that if we could eliminate competition, and also stop the law suits which were going on at that time and overs very expensive, as far as my own house was concerned, it would be a good thing. If we could aliminate that and also stop the federal litigation unoughnessed both by Mr. Pargo and Mr. Gates" (p. 283-b). He are the Fargo suit "there was quite a number of suits acted, but whether they had got very tax along or not

"my memory don't serve me" (p. 283-c)

There is no evidence as to the amount of business in patented or unpatented articles in the states named,—Wisconsin, Minnesota and nearby states—nor is there any testimony from which a comparison can be made with the like business in other states. It is clear, however, that no control was obtained of any branch of the creamery supply business, whether in staples or in patented articles.

Manifestly both the purpose and the effect of the agreement was to foster reasonably and fairly the trade of the parties to it by avoiding and compromising litigation and by discontinuing a ruinous rivalry far beyond the proper competition to which the public is entitled. The Sherman Act does not condemn the usual devices by which active and enterprising merchants shield and extend their business, nor does it place an embargo upon the adjustment and compromise of litigation. Nothing is forbidden except restraint of interstate or international commerce over and above what is reasonably necessary to promote and toster the private ' terests of the individual merchant.

2. The 1898 general agreement did not constitute an undue restraint of interstate commerce.

Our review of the evidence shows not only that this agreement was designed to extend and protect the business of the parties to it, but also that the restraint of interestate commerce (if any there was) was only such as all morehants under like circumstances are entitled to impose for the safeguarding of their own interests. It is important to bear in mind the circumstances existing at the time the agreement was made. The business of manu-

facturing and selling creamery supplies then comparative ly new had drawn to itself many enterprising dealers who were eager to obtain the trade that was then being developed. The result was keen and ruinous competition, which required some change if the participants were avoid bankruptcy. They could either continue their discutrous war of prices or some of them could retire from business and thus restore the market to a normal condition, or they could form a union of their interests in one concern. Certainly they were not bound to invite financial ruin by continuing an unreasonable and excessive competition. The public was not entitled to such rivalry and was not harmed by its removal. Nor does the Sherman Law require business men to continue in competition until their capital is exhausted, with no alternative except to retire from the field, leaving for others whatever trade there is to be obtained. We submit that there is a third course.a union of the competing concerns so far as it is necessary for the reasonable protection of each. At common law a merchant has a right to safeguard himself by buying out his competitor. As was said by the Supreme Court of Minnesota: "A party may legally purchase the business fand trade of another for the very purpose of removing For preventing competition, coupled with an undertaking "on the part of the seller not to carry on the same business "in the same place or within the same territory; and the "question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection to the party in whose favor it is made; as "the limits of restraint as to space depend upon the kind of "trade or business which is the subject of the contract" (45 Minn., 276).

The prohibitions of the Sherman Law extend only to

united restraint (Standard Oil Co. v. United States, 221 U. S. 1; American Tabacco Co. v. United States, 221 U. S. 186). That law was enacted "in the light of the existing practical conception of the law of restraint of trade" (221 "U. S. 50); and, evidence the intent not to restrain the "right to make and enforce contracts, whether resulting "from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that "commerce from being restrained by methods, whether old "or new, which would constitute an interference that is "an undue restraint" (221 U. S. 60).

This decision has been so recently rendered after so full a discussion that we make no further extract from it except to quote a single additional sentence referring to the development of the common law in respect to trade restraints: "After all," says this court, "this was but an "instinctive recognition of the truisms that the course of "trade could not be made free by obstructing it, and that "an individual's right to trade could not be protected by "destroying such right" (221 U. S. 56).

In 1898, when the agreement now under discussion was being framed, the parties to it were confronted by a situation which they met with segacity and foresight. Instead of continuing their business at a loss until the "weaker and smaller houses" were driven to the wall (p. 803), they united their resources and proceeded as a single concern to their reasonable profit and without detriment to the public. This we submit was entirely within their rights under the Sherman Law as interpreted by this court, and we far from being an improper or illegal act, was in fact the only course which, as pradent and careful business not, they could have taken under the circumstances then existing.

The decisions in State v. Creamery Package Manufacturing Company, 110 Minn, 415, 115 Minn, 507, do not make against this contention. They involve the State Anti-Trust Law (R. L. 1905, \$5168), which made it a felony for any person or association of persons to "enter into any "pool, trust agreement, combination or understanding "whatsoever with any other person or association, corpor-"ate or otherwise, in restraint of trade within this state, "or between the people of this or of any other state or "country, or which tends in any way or degree to limit, "fla, control, maintain, or regulate the price of any article "of trade, manufacture or use bought and sold within the "state, or which limits or tends to limit the production of "any such article, or which prevents or limits competition "In the purchase and sale thereof, or which tends or is de-"cioned so to do." The prohibitions here are much more drastic than those declared by the Sherman Law, for the forbidden acts include not only restraints of trade, regulation of price, limitation of production or of competition, but also everything that "tends or is designed so to do." The decisions are open also to the following objections:

(a) The first decision—110 Minn, 415—(made before the opinions in the Standard Oil and Tabocco cases were handed down) held that the "character of the competition "it not under the statute material," and that "the important question is that competition actually existed to "solich the agreement put an end" (110 Minn., 421). For these propositions the court cites the Preight Association case (166 U. S. 290), erroneously assuming that that came construed the Sherman Law to prohibit all restraints of trade, whether due or undue; but the Preight Association case is no longer subject to such construction. It was because of this erroneous view that the two recent decisions

of this court limited and qualified the earlier cases (22) U. S. 48).

(h) The Minnesota Supreme Court construed the 1808 greenent is providing "for directors representno who made transfers of property, said for a minicision of profits, thus continuing the control of wing such control with the majority of the stock, where "In is wedinarily found" (110 Minn., 48). The contract mortalon as to directors (p. 50-a of this record) is that "three of the present directors of sall Ceramery Packars "Manufacturing Company" (naming them) "shall resign an such directors, and there shall be named in their place e following named persons! (naming them). Evident-Minnesota court fell into an error in assunding that est for the election of directors was a continent one. A reading of the provision shows that it could apply only to the then Board of Directors. The substitutice of the new members for the old was a subattention only for the current term. No director named in greenent had any vested or permanent right in his offee: He was a director for the unexpired term only,at is until the next election, which according to the listate, must occur within three years and might ocmuch econer (III R. S. Ch. 32, Corporations, \$3). ever the gangal meeting convened each holder of the stock was entitled to vote for all of the directors whose turns had then expired, whether those directors were namin the February agreement or not. The stockholders' right to vote was not interfered with. The provision had to do absolutely with the then running term, and not with my future term; it was exhausted at latest in Polymary.

That stockholders by quanimous agreement may consent that certain persons be elected as minority directors well settled in the State of Illinois. In Kontzler & Beatager, 214 Ill., 589, a contract to which all the share holders of the corporation were parties provided for the sale of part of the stock to other parties to the contract, and farther that certain of the parties to the contract should be elected officers in the corporation for a fixed period. It was held that such contract was enforceable. This decision is fully approved in Hladovec v. Paul, 222 Ill. 254. Bo "A scontract by which the directors who own a majority of the stock sell such stock and agree to substitute the renders us directors of the Company, is legal" (Cook on Corporations, §622 (a), 6th Ed., p. 1700, n. 1; Faulds v. Ystes, 57 Ill. 516).

(c) The provision for the division of profits did not give the stockholders an unusual or unfustifiable control of the beginess. The dividend clause is That of the net profits from the business of said Oreamer, Package Com Trany at least one half thereof shall be paid and distribut-"so each year among its stockholders, unles determined by ununimous vote of the Board of Directors of said Creamery Package Manufacturing Company" (p. 57-a). It is true that ordinarily the discretion of the directors as to the amount of dividend to be declared in t interfered with by the stockholders; but agreements to contrary, either among promoters or subscribers or an a by-law of the corporation, are not infrequent. Those who invest their moneys in corporate stock sometimes suppolate for yearly returns of a fair proporition of the profits as against allowing the profits to remain in the postpess to be used in its furtherance. Such agreements do not, we submit, tend to show that the stockholders control their investment as if it were not subject to corporate action.

A limited restriction on the power of directors to use the earnings instead of dividing them, does not affect the entity of the corporation, nor does it free the stockholders' investment from corporate control. It is one of the many modern modifications of corporate management showing a tendency to limit by wise restriction the absolute discretion of directors. This tendency appears nowhere more clearly than in the Minnesota Corporation law, which now permits Articles of Incorporation to contain, besides many details specifically enumerated, "any other lawful provis-"ion defining and regulating the powers or business of the "corporation, its officers, directors, trustees, members and "stockholders" (R. L., 1905, §2849). The same tendency exists in Illinois, where, for instance, stockholders may without statutory permission issue preferred stock having fixed dividends,—a plan of distribution of profits, lawful in Illinois, and yet open to much more serious criticism than a contract provision that not less than one-half the actual profits shall be distributed each year (Higgins v. Laneing, 154 Ill. 301; Cratty v. Peoria Law Library, 219 III. 616).

It is proper to add that the Minnesota case is now pending in this court on the federal questions involved.

2. THE 1898 GENERAL AGREEMENT, DEALING AS IT DOES WITH PATENT RIGHTS, IS NOT WITHIN THE SHERMAN LAW.

Our contention that combinations among patent owners are not within the Sherman Law is presented in Topic X.

4. There is nothing in the 1898 General Agreement to show a design to drive competitors out of business by groundless suits.

In one sense every seller, by completing his transaction, takes the same transaction away from a competitor, and thus drives him out of business in that instance; and the greater his success, and the more frequent and larger the number of his transactions, the more thoroughly does be exclude his rivel. This phase of competition has been adverted to in Whitwell v. Continental Tobacco Co., 125 Fed. 454, and in United States v. Standard Oil Co., 173 Fed. 177. In the last named case it is said:

"Undoubtedly every person engaged in interstate com-"merce necessarily attempts to draw to himself, to the ex-"clusion of others, and thereby to monopolise a part of that "trade. Every sale and every transportation of an article "which is the subject of interstate commerce evidences a "successful attempt to monopolise that trade or commerce "which concerns that sale or transportation."

Much stress is laid by plaintiffs' attorneys on some of the testimony of the witness Frink, where he uses the phrases "cover the entire field" (p. 811-b), "control the world" (p. 811-c) and "driving others out of business." Frink (who is certainly not friendly to the Creamery Company) uses these phrases in detailing the discussion before the 1898 General Agreement was made. Even without making any allowance for his bias, it is manifest from the context that these expressions did not denote any design to use any improper or illegitimate means of competition; least of all an intention to reduce or suppress competition by baseless law suits. A reading of Frink's evidence makes this clear. He says:

"We argued at this meeting that the patents already on "the combined churns would cover the entire field" (p. 211-b). \* \* \*

"We considered that the patent held by the Cornish, Cartis "and Greene Mig. Co., by Barber and Fargo, and those "held by the Owstones Manufacturing Company, which "held the Drisbow, if we were to put them all together in "one firm, we thought that we would control the world. We "thought that the patents were so broad. We had a very "long and spirited argument upon what they did include, "and if they did cover all the business" (p. 311-c). \* \* \* \*

"Q. Of course you didn't have any idea that you could "control the Eastern market?"

%A.: Yes, we thought we could.

"Q. You thought you could?

"A. Yes, sir, we thought we could go ahead and cork out Burrell. We thought we could drive them out of the trade by a superior enables.

"Q. That is what you mean, you had such merits in "those churns, that there couldn't be any competition with "you on the merits of those churns?

"A. It was argued that if we made the Victor and the "Disbrow, we could lay all the rest of the patents on the "shelf, and drive everybody else out of the business with "these two machines.

"Q. You thought you could drive them out?

"A. By having a superior machine.

"Q. By competition with the other machine?

"A. By having a better machine."

"Q. Why are you so reluctant to admit that you did

"A That is all there was to it by having a superior

"machine" (p. 312a & b). \* \* \*

"Q. You don't profess to any what machines were its "the market in the Bust at that time, do you?"

"A. With the exception of one made by Mr. Burrell, "and one made at Schenectady, New York, those are the "only ones I can call to mind.

"Northwest with these three or four states?

"A. Yes, sir (p. 818).

"Bistes, as to what they used in their creameries, square "box churns, power churns and everything, compiled by "the Dairy Commissioners. The discussion was and the "principal thing was whether we had a better churn than "any of them" (p. 314-c).

"patenta by the Owatonna people, to see how many they controlled.

"Q. You don't know about the rest?

"A. I looked over a good many, I don't know how "many.

"O You were looking over the Dishrow patent?

"A. Yes, sir, and all that we thought covered the field." (p. 817-c). \* \* \*

"Were these patents that you examined the patents "that were referred to and under discussion and in litiga"tion at that time? Is that right?

"A. I suppose they were, I don't know where they got "them" (p. 318-c). \* \* \*

"Q. What did you mean in giving your answer whatferer it was, by 'All the patents,' what did you mean by "'All the patents'? (p. 820-a).

"A. A meant that the patents which were then controlled

ter could be controlled, in that they could get ball of, or fixed in their knowledge at the time, or could have in the fu-"ture" (p. 2006):

Obviously what Frink is talking shout is the patents that were general or controlled by the Crossery Co. the Cornish Company and the Fargo Company, who were this continent the agreement that they sive wards made When he speaks of "all the patents" he means "all" the patents to be included in the agreement. So when he was the expressions "cover the entire field" and "control the Special" he has reference only to the merits of the churntants sweed by the parties then in negotiation and the miness that would be done by them, and not to a dodge to three withor competitors on or the market by fair me on or foul. There were many other churns on the market. Frink knew of a number of them (pp. 312-c, 297-b), and e in his answer in the infringement suits, verified to the complaint best (p. 15; par 31) makes an extensive showing of other machines in the same art (pp. 141, 142). Prink and the others who took part in the discussion conered these machines "inferior" ones (p. 818-a), and the if was that by having a "superior machine," by having a "better machine" they could "drice everybody else "out of business" (p. 1124). "That," mys Prink,"is all There was to it, by having a superior mechine" (p. 312-b). Clearly Frink is speaking only of the business success which as a necessary consequence of competition causes the timerior commodity to be demanded by the consumer to the exclusion of the inferior one.

That this is his mouning is emphasized by Frink's testiknow as to the action taken in regard to Cushman & Company. He is asked (p. 201c) to tell of the discussion there was it a meeting of the directors of the company (this Continue was considered and talked about). An objective teing made to this question, the plaintille common affered to show that the Creamery Company had a granulable of sile competitors; " " some of the competitors they would buy out and other competitors thay closed out by lowering prices. If they couldn't buy them "out they would use some other secase" (p. 291-c). Being them ested by the Court whether they proposed to show "anything more by this witness than that the Creamery Company bought out A. J. Cushman & Company" plaintiffs' attorneys replied in the affirmative, adding, "We wish to show the various ways of getting rid of these competitors, and that these various ways were discussed at "these meetings. We offer this," they say, "to show a general conspiracy" (p. 292-a).

Prink is then permitted to answer the question. The answer is in effect that "the competition had been flerce," that "the argument very soon came to a point where they "made up their monds that it would be cheaper to buy him" (Cushman) "out, even if they had to pay a good price," and that there was no money in it for use to continue it the way it had been "running" Frink's advice was to "buy him out and get rid of him that way," and this was done (p. 292). "Some of the parties," Frink says, were for "driving him out of the trade" by cutting prices. He to them asked this question: "Did you hear any discussion "as to any other competitor besides Cushman after that "date?" His answer is, "If I did I don't remember it now, "for the reason that I was interested only in that one, and "they wanted that I should take charge of it" (p. 295-a).

The offer here was to prove "a general conspiracy." This must mean a conspiracy to overcome competition by meti-

the state of these charges in the complaint—by threecharges and bringing groundless fave exits. The festimony and the filling the measure of the offer is simply that and the directors were in favor of further competition with long peters, and others were in favor of buying out accumpation, and the latter course prevailed. This not onfells to show the imputed purpose, but in fact negatives cut surpose, and is accompanied by a denial by the witme of any recollection of any discussion as to pay other received.

Considering all the evidence, there is not the slightest ground in the record for a claim that either of the designate ever had the design to drive competitors out by mainwish means, least of all by trumped-up law suits. This phases in Frink's testimony so much emphasized by a plaintime counsel in their brief, when read as they hould be in their context, wholly fall to show any such design, but on the contrary show only that logitimate competition which it is the right as well as the duty of rivals in commerce to use. "A contract is not to be assumed to be contemplate unlawful results unless a fair construction requires it upon the established facts." (Oincinnet) do. Product Oo. c. Bay, 200 U. S. 179, p. 184).

CONTROL ADDRESS OF THE CHARLES COM-CASE OF CHARLES OF THE THAN THE OWN, AND IN AC-CHARLES OF THE CONCRESS, DOIN NOT TEND TO SHOW A DE-CHARLES OF THE CONCRESS OF OF TENHORS.

Um or Harris. The Creamery Company used the name of the Pargo Company about three years, and then changed to the Pargo Creamery Supply House, under which name is in the conducted its business at St. Paul and Labsaille (pp. 217-c, 235-c, 278-c, 279-c). The Fort Attimes business has been carried on in the name of Cornish, Curtis & Greene Manufacturing Company (p. 235-a). The name of Cornish, Curtis & Greene Company was used in St. Paul for about a year (p. 255-b), and the name A. H. Barber & Company in Chicago until September, 1903; and until 1903 the Pargo house and the Manespolis branch of the Greenery Company at times made apparently competitive, but really non-competitive, bids to customers (pp. 239, 829-c, 830-a, 835-b, 837, 885-c, 886-a, 887).

ACQUIRTION OF OTHER CONCERNS. After the agreement of 1898 the Creamery Company acquired the Combinan house in Waterloo, Iowa, a competitive concern, for \$46, 000 (np. 360-a, 367-c, 362-a, 366-b); the Ward concern in St. Paul (also a competitive house) in October, 1965, for \$14,090 to \$16,000 (pp. 275-a, 378-a, 374-a); the Frement Butter Tub Company at Rock Island in 1904 or 1905 for a consideration that does not appear in evidence (pp. 276, 271-b); a part of the business of Cornish, Sturgis & Burn at St. Paul, Chicago and Kansus City in 1908 or 1904 in settlement of some patent litigation brought by that comcany against the Creamery Company (pp. 238, 272-c); the Stoddard Manufacturing Company, of Butland, Vermont, in 1906 for a consideration not named; and Cook & Reed at Des Moines, Iowa, at a time and for a consideration that does not appear in evidence (pp. 271-a, 154-a). None of these concerns except Cushman & Co. and Ward & Co. are shown to have been competitors.

The Creamery Company during the years 1900 and 1901 had a contract for the exclusive sele of Simplex churns in some Western territories on royalties (pp. 506-c, 506, 511-

There elected new have a large with the competition with the Company's charm, these being made made the Simplex in use in the Outsel State (p. 278-b).

Bound the street actions in any way affected the plate. is or showed any purpose to silence competitors by law were in fact no law suits brought by the Creamery Company, or by any of the concerns that entered into the 1808 General Agreement after that agreeant was made. The record shows that in April, 1897, ers was much litigation settled by the agreements then ie: that in June, 1898, the suit of the Owatonna Manufacturing Company against the Fargo Company was also settled, and that in 1903 or 1904 a suit by the Corninh, Sturgis & Burn Company against the Creamery Company sulted in a settlement by a purchase of a part of the siness of the plaintiff company (p. 238-c). Aside from mits no other litigation is shown in the record, nor is there any intimation anywhere that any of the suits referred to were other than a bone fide assertion of valid causes of action.

The claim of the plaintiffs is that defendants sought to drive them out of business by bringing suits alleged to be groundless and by making threats as to other groundless urits, and that all this was in pursuance of a conspiracy in violation of the Sherman Law. The evidence shows that this claim is itself groundless. Whatever was done by the Creamery Company or the other concerns entering into the 1898 agreement had no relation whatsoever to the suppression of competition by trumped-up law suits. Neither the adjustment of the destructive competition existing in 1895, nor the business methods adopted by the Creamery Company afterwards in using names other than its own,

nor the enlargement of its business by the acquicition of other concerns can by any construction have a bearing on the subject of harmening or crippling competitors by the misuse of the process of the Courts. The purpose imputed to defendants finds no support in the evidence.

#### TOPIC IV.

### The Alleged Monopoly of the Creamery Company.

Much is said in the plaintiffs' argument concerning the monopoly which they ascribe to the Creamery Company. The claim is that the Creamery Company and the other defendant corporation united to bring the two infringement suits and to threaten other suits for the purpose of further enlarging the supposed monopoly. This claim is without any foundation.

1. THE CREAMERY COMPANY HAS NEVER MONOPOLIZED OF ATTEMPTED TO MONOPOLIZE ANY PART OF INTERSTATE COMMERCE WITHIN THE MEANING OF THE SHEEMAN LAW.

The courts have not found it an easy matter to define what is meant by the word "monopolise" in the second section of the Sherman Law. Some of the definitions are collated in Noyes on Corporate Relations, \$380, p. 711. The best of these is in National Cotton Oil Co. v. Tenes, 197 U. S. 115. Although the discussion in that case concerned the Anti-Trust Acts of Texas, the definition is squally applicable to the second section of the Sherman Law. Mr. Justice McKenna in the case cited gives this description of a monopoly:

"It is enough to say that the idea of monopoly is not "now confined to a grant of privileges. It is understood the header a 'condition produced by the acts of more inthe section of exclusiveness or unity'; in other
tords, the suppression of competition by the unification
of interest or management, or it may be through agreement and concert of action. And the purpose is so definitety the control of prices that monopoly has been defined
to be 'unified tectics with regard to prices.' It is the
'second to control prices which makes the inducement of
combinations and their profit. It is such power that
'makes it the concern of the law to prohibit or limit them'
(197 D. S. 129).

present case there is no evidence of either an tential control of prices. Immediately after ler p as 1886 General Agreement the prices on patented articles were raised from ten to thirty-five per cent (Frink, pp. 206 b. \$27; Holman, p. \$28 a 2 b). According to Holman there was a gradual increase in the prices of unpatented articles up to November, 1899 (p. 326-a), when he ft the Creamery Company's employ. This he shows which he produced (pp. 840-845). ind letter is in October, 1800 (p. 845). The letters show too that the increase during the year 1809 was on secount of an advance in the price of material (pp. 340-\$46). Frink left the service of the Greamery Company in September, 1906 (p. 276-c). His personal knowledge of edes ends with September, 1898 (p. 276-c). During following two years he was manager of the aim department of refrigerating machines (p. 276-c). His subsequent knowledge was not directly in the es of his business (p. 801), and at all events endwith September, 1900. This is all the evidence with in the recent actor prices, except that prices

before February, 1886, were so low that the expenses are up the profits (p. 204-c), and this on seconds of the hose competition (p. 208-b). There is no evidence of any prince except in Minnesota, North and South Dakota, Winsonsin and northern part of Iowa (p. 200-c), and perhaps Eurses, Nebraska and Illinois (p. 278-c).

The Creamery Company extended its business by buying the whole or parts of other concerns—six all told—one purchase being made as part of a settlement of litigation (pp. 238-c, 239-b). Only two were competitors—Cushman & Company, bought early in 1899 (p. 360), and Ward & Company, bought in October, 1905 (pp. 374-a, 373-a). Immediately after the agreement the competition was reduced to about one-third in Wisconsin, Minnesota and nearby states (p. 298-a). In these three states the Creamery Company then had about ninety per cent of the trade in patented articles and complete outfits (pp. 293-c, 194-a), and according to Frink's "guess" the Creamery Company had all the business in supplies (p. 294-a); but this "guess" was revised on cross examination, for he concodes that many supplies can be bought in the open market (p. 317a & b), and that about one-third in value (another witness says "a large proportion") of the things that go into creameries could be bought anywhere (pp. 305-c, 349c). There was ample competition in these articles and also in patented articles owned by different houses (pp. R-c. 298-a, 305, 306-b, 313-a, 314).

Plaintiffs' counsel emphasize the boast of Cooper, the Creamery Company's Manager in Minneapolis, as reported by Virtue—"We think we own the creamery supply bush "ness around here!" Cooper was trying to Induce Virtue to accept an agency with the Creamery Company. The prices were too high, as Virtue thought. Cooper said the commons would have to pur the price, and added the remed that we have quoted (p. 519). This was simply the pulling which the law possible to traders dealing at arm's length, such extelling his own goods and his own trade, and back by the natural blue of self-interest claiming more than a distinterested arbitratur would be likely to allow to atthem.

We have already discussed Frink's testimony (Topic III, 4 of this brief), in which, while detailing the discussion before the 1808 General Agreement, he uses the plane "cover the entire field" (p. 811-b), "control the "world" (p. 811-c), and "driving others out of business" (p. 812). These phrases come from the lips of a willing witness ten years or more after the occurence, and (as the witnest above) express in an arraggerated way what the afficipants in their optimistic trade talk supposed they could do with their machine (which they couldered a "superior" one) in competition with the "interior" machines of their business rivals (pp. 813, 818-a). The discussion was the language of hope, not of accomplishment, and in the end proved as empty as most of such beasting in

There is no coldence as to the amount of business done in the states named or as to the amount of business in the same lies in other states, or as to the amount of business done by any of the concerns that were bought or by any of the concerns that were bought or by any of the competitors (p. 815-c)—same of them large concerns (p. 815-a 2 b)—sales still remained in business in those states. There were many other machines in the market (pp. 815-c, 815-a), and one of them—the Simplex—is shown by the critiques to have obtained a large business not only in Himmoria, Iowa, North and South Daketa, but throughout the United States (p. 478); and as far as the plain.

tills themselves are concerned, their claim is the conplaint is that before the two infringement suits were brought they were engaged in manufacturing combined charms and butter-workers, "and then had agents and "gencies throughout the several states of the United "States" for the selling of the "machines made by them," and further that they then had "a good and established "trade and market for said charms" (Complaint, par. 84, p. 19-b).

The record gives no warrant for a finding that the second section of the Sherman Law has been violated. The reason is that the evidence shows neither the control of prices in fact nor the power to control prices by the Orean-ery Company. The prices of general creamery supplies,—articles of ordinary commerce ranging from butter color to steam-engines (pp. 317-a, 386-a), cannot be controlled, nor can competition in them be materially affected by any concern, however large. The only controllable articles are patented devices, and these are rightfully controlled through the ownership of a lawful monopoly.

The case is entirely unlike the Standard Oil Case (221 U. S. 1) or the Tobacco Case (Ibid., 106). In the former it was found that from 1899 to 1907 the Standard Oil Company and its subsidiary companies controlled practically all the oil business of the United States (221 U. S., pp. 72-77). In the Tobacco Case the undisputed facts showed an actually existing "dominion and control over the tobacco "trade" (221 U. S., p. 182). Here there is no control of any kind shown. Even the corporations that entered into the 1898 General Agreement were dissolved (pp. 232-c, 165-b, 278) as provided by its terms (p. 50-a). There never was any control of the stock of those corporations by the

Greamery Company. That company issued to the stock-holders of the purchased corporations or the partners in the partnership its stock at par for money or for property at its fair cash value. There was no holding by any person as trustee for the other stockholders. The corporations simply sold out their business, as did the members of the dissolved partnership.

2. Even if the Creamery Company had monopolized a substantial part of interstate commerce, no causal connection is shown between its acts and the damages claimed by plaintiffs.

STATE OF THE PARTY OF THE PARTY

The claim here asserted is for damages to interstate trade by bringing and threatening infringement suits, in order to accomplish a purpose contravening the first two sections of the Sherman Law. But even if (for the purposs of the argument) we assume both that the Sherman Law was violated by the defendants, and that plaintiffs subsequently suffered a damage, there is no causal relation between the two. The claim is propter because post. The theory of the plaintiffs' attorneys seems to be that if a violation of either the first or the second section of the Sherman Law be shown, then any tort thereafter committed or any contract thereafter broken can, without evidence of causal connection, be referred to the violation of the law and thus give rise to treble damages. This was the plaintiffs' attitude in the Court below, and is here (See plaintiffs' brief, pp. 45, 71, 76, etc.). But it is elementary that no right of action accrues without such causal connection.

A statutory duty stands in the same class as one imposed by law, and the violation of either of them may, if other essentials exist, give a cause of action, but only for injuries naturally and proximately resulting from the violation of the duty. The common law or the statute declares what shall be done or what shall not be done. If the command be disobeyed to the injury of some one within its protection, the wrong-doer must respond merely for such damages, as flow from his wrongful act. In cases sounding in negligence the rule that the violation of law must be the proximate cause of the injury complained of is stated as elementary in the Encyclopsedias.

"Although the defendant's vilolation of a statute or "ordinance and the plaintiff's injuries consequent there upon be shown, the former will not be liable merely because his act constituted a violation of a litate or "municipal law, but only if it proximately caused the infries complained of".

21 Am. & Eng. Ency., 2d Ed., 480.

"Although the violation of a statute is held to be negli-"gence per se, there must be a causal relation between such "act and the injury to render defendant liable, and such "violation must be the proximate cause of the injury."

29 Cyc., 439.

Here, conceding for the sake of argument both the violation of law and actionable injuries, there is no relation between the two except that of time. The patent suits and the warnings of other suits did not form a part of or result proximately or even remotely from any act forbidden or declared unlawful by the Sherman Law. They occurred after the claimed violation, but they did not arise out of it. If plaintiffs have suffered an actionable wrong, their redress is by suit and the proper tribunal for single damages, and not in the Federal Courts under a Federal statute for trebly increased compensation. In the succinct

language of the trial judge, the damages claimed are not such "as are contemplated by the act, and there can be no "recovery for them in this action" (p. 567-c).

#### TOPIO V.

## The Creamery Company's Title to its Patents.

On the assumption that the 1898 General Agreement was in contravention of the Sherman Law, plaintiffs claim that the agreement was void and that no title could pass by it. The argument is that the patents which were the subjectmatter of the infringement suit brought by the Creamery Company against the plaintiffs here did not belong to the Creamery Company because acquired under an agreement in violation of law, and that, therefore, the suit was groundless. Without now considering the effect of the interlocutory judgment in that suit in favor of the Creamery Company (we shall discuss this under the next topic) we now take up the question of the title acquired by a grantee or assignee under a contract in contravention of the Sherman Law.

1. AN EXECUTED RESOLD CONTRACT CARRIES TITLE TO THE SUBJECT-MATTER IN THE SAME WAT AS IF THE CONTRACT WERE LIGIAL, UNLESS THE LAW VIOLATED DECLARES TO THE CONTRACT.

It is said in the books that illegal contracts are void, but the word is used loosely in the sense that the contract (while executory) cannot be enforced between the parties; it does not mean that if a contract transferring title is in violation of law the title is either put at large or remains

to the and poor (15 Am. d Boy Proy, 200). If no title s, a singular condition of affairs would arme. Und familiar principles parties to an illegal contract are left where the law finds them and are denied a recovery on the contract . (McMullen c. Hoffman, 174 U. S. 689). The assignor (being thus mable to compel a reconveyance) could not establish any property rights against strangers. On the other hand, the assignee (on the hypothesis that the illegal contract conveyed no title to him) would also be unable to defend against intruders. The property would thus become subject to appropriation by any third person. Neither of the parties to the contract could sue for trespans—the assignor because he had parted with his title, the assignee because the apparent title to him was void for illegality. A stranger would, therefore, have a better title than either and could destroy or retain the property as he chose. In the present case Virtue and the Owatonna Company, having infringed the Creamery Company's patents, could say (as they do now) that the Creamery Company had no title because none passed to it under the contracts. If they were sued by the Fargo Company their defense would be that the Fargo Company had parted with its title and therefore was not entitled to recover damages for infringement. The title this way liable to appropriation by the public, the pl (so the first takers) would acquire without price, w er royalty valuable patent rights to which th fust claim at all in law or equity. This es so opposed to elementary principles that it es favor in judicial decisions.

A leading case on this subject is Pritts v. Palmer, 135 U. S. 282. One Groshon was the owner in fee of a tract of land in Colorado. He conveyed it to a Missouri corpo-

ration which had not then and did not thereafter comply h the provisions of the Constitution and Laws of Colo rule. The Constitution declared that no foreign corporation should do business in the state without having a known place of husiness and an agent on whom process might be served. The laws required the foreign corporaties to the a certificate showing its place of business and designating its agents, and to file also a copy of its charter or Articles of Incorporation. In default every officer, agent and stockholder of the corporation was jointly and verally liable personally on its contracts while the default continued. The laws and provided that no corporation, foreign or domestic, should purchase or hold real estate except as provided in the Act. Fritts claimed under a deed by the Missouri corporation. Palmer claimed under a subsequent deed from Groshon. It was held that Fritts had title to the land. Mr. Justice Harlan, writing the opinion of the Court, says:

"It is not for the judiciary, at the instance or for the benealt of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfaiting, for the benefit of such parties, the state thus conveyed to the corporation and by it conveyed to others. If Grosbon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded. But the present plaintiff, who asserts title under a quitelaim deed from Grosbon made after the property had passed, by the sale under the deed of trust, from the Mining Company, confect, in low, compy any better position than the original present would have done if he had himself brought this

"no title should pass under a conveyance to a foreign "corporation purchasing real estate before it acquires the "right to engage in business in the state, and that such a "conveyance should be an absolute nullity as between the "grantor and the grantee, leaving the grantor to deal with "the property as if he had never sold it, that intention "sould have been clearly manifested" (182 U. 8. 289).

# 2. The Sherman Law does not forrid the passage of tells, but on the contrary impliedly sanctions it.

Generally speaking, no one can justify a tort or trespans by showing that it was committed against property illegally acquired. To hold to the contrary would put property rights in hopeless confusion. A different question, however, is raised where the violated statute imposes the nonpassage of title as a penalty. In such a case the commands of the State require obedience, no matter what the effect upon property rights may be. But in the Sherman Law there is no such command. On the contrary there is (by implication at least) a clear recognition that the violation of the statute does not affect the title. That law declares certain contracts illegal and imposes definite punlahments; and by one of its sections (Section 6, which we quote) it deals expressly with the title to the property sequired under such contracts:

"Sec. 6. An property owned under any contract or "by any combination, or pursuant to any conspiracy (sad "being the subject thereof) mentioned in section one of "this act, and being in the course of transportation from "one State to another, or to a foreign country, shall be "forfeited to the United States, and may be seized and

Tourismed by like proceedings as these provided by law Man the forfeiture, eviders and condemnation of property Simported into the United States contrary to law?

This section recognizes clearly the passage of title under an Olegal contract. Moreover, under the rule appressio anims, the provision for forfeiture, seisure and combination, under specified circumstances excludes all other grounds of attack.

In Cosmolly v. Union Sewer Pipe Co., 184 U. S. 540, this phase of the Sharman Law was under consideration, and the law is thus construed in the opinion of Judge Harian:

The act does not declare illegal or void any sale made "by such combination, or by its agents, of property it "acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another for to a foreign country. The buyer could not refuse to "comply with his contract of purchase on the ground that "the seller was an illegal combination which might be "restrained or suppressed in the mode prescribed by the "Act of Congress; for Congress did not declare that a "combination illegally formed under the Act of 1890 should "not in the conduct of its business become the owner of "property which is might sell to schomsoever wished to buy "it." (184 U. S. 550).

A construction of the Sherman Law was also made in Harriman v. Northern Sometties Co., 197 U. S. 244.

After the decision in the Northern Securities Case (193 U. S. 197) the directors of the Northern Securities Company adopted a plan to reduce the Company's capital stock and distribute the shares of stock acquired during its existence among its stockholders. Harriman sought to prevent this distribution and to regain the possession of

the original shares contributed by him to the Northern Securities Company. He was refused any relief on the ground that the shares had been parted with under an executed illegal contract unrepudiated by the opposite party; that he was in part delicite; and that the contract being executed, neither party could obtain any relief nor be aided in law or equity to enforce the contract or to set it aside. In the opinion Mr. Chief Justice Fuller says;

"Some of our number" (Judge Fuller is now speaking of the original Northern Securities Case) "thought that "as the Securities Company owned the stock the relief "sought could not be granted, but the conclusion was that "the possession of the power, which, if exercised, would "prevent competition, brought the case within the statute," no matter what the tenure of title was. Treating the "question as an open one, it seems to us indisputable that, "as between these parties, the transaction was one of purchase and sale. (197 U. S. 291). \* \* \*

"The purchase by the Securities Company was on its "own secount and not in trust, and cannot be disturbed "because of illegal purpose at the clamor of parties is pari"delicto. And there is here no offer of the restoration of "the status quo, if that were practicable. (p. 298). \* \* "

"In fine, the title to these stocks having intentionally "been passed, the former owners or part of them council" reclaim the specific shares and must be content with their "ratable proportion of the corporate assets." (p. 209).

As regards this case it may be said that it applies the rule is part delicto. It does this, but it does something besides. If a violation of the Sherman Law rendered the contract void so that no title passed, Harriman's contention ought to have been sustained. The rule is part delicto would have been over-ridden by the command of law, mak-

g the whole transaction rold and of no effect. This would leave the title where it was—in Harriman—in spite of his transfer to the Northern Securities Company, the instrument of transfer being itself mere waste paper. The Court did not so construe the statute, but on the contrary held that Harriman had made a valid conveyance. although the contract was in violation of the Sherman Law. The only possible alternative was that the agreeent of transfer was void, but that Harriman had no standing in equity to recover his stock, while at the same time the Northern Securities Company had no right to retain it. Both grantor and grantee would thus be deprvied of the title, and the property would be subject to approprintion by the first taker. But the decision leaves no room for the adoption of this alternative. Harriman is ultimately permitted to recover "his ratable proportion "of the corporate assets." The title to the subject-matter of the illegal contract is thus confirmed in the grantee, the Northern Securities Company, and Harriman as granter received a part of the assets in lieu of his stock. The executed illegal contract is thus given the same effect as respects the passage of title as would be given to a legal contract of the same tenor and effect.

The claim that a patent owner, if a party to an illegal combination, is by that fact debarred from equitable remedies against an infringer, has been frequently raised in the Circuit Courts and in the Circuit Courts of Appeal, and (with a single dubious exception to be noted hereafter) has been uniformly decided in favor of the patent owner.

Strait v. National Harrow Co., 51 Fed. 819 (C. C., N. Y.).

Edison Electric Light Co. v. Bacyer Mann Electric Co., 53 Fed. 592 (C. C. A., 2d Circ.).

Roda Fountain Co. v. Green, 69 Fed. 888 (C. C., Penn.).

Bonsack Machine Co. v. Smith, 70 Fed. 383 (C. C., N. C.).

Saddle Co. v. Trowel, 98 Fed. 620 (C. C., Ohio).

National Folding Box & Paper Co. v. Robertson, 19
Fed. 985 (C. C., Conn.).

Otis Elevator Ca. v. Geiger, 107 Fed. 131 (C. C., Ky.). General Electric Co. v. Wise, 119 Fed. 922 (C. C., N. Y.).

Fuller v. Berger, 120 Fed. 274 (C. C. A., 7th Circ.).

Motion Picture Patents Co. v. Laemmle, 178 Fed. 104

(C. C., N. Y.).

Motion Picture Patents Co. v. Ullman, 186 Fed. 174 C. C., N. Y.).

The opinion in Saddle Co. v. Trowel, 98 Fed. 620, states clearly the ground upon which these decisions go. That case came up on exceptions to answers to bills to enjoin patent infringements. One of the exceptions was "directed to an averment that the complainant is a constituent of a combination or trust alleged to be in violation of the so-called Federal Anti-Trust Law and void under common law rules." In sustaining this exception the Court (by Taft, Circuit Judge) says:

"The averment that the complainant is part of a combination or trust is irrelevant and impertinent for the "reason that it is no ground for denying relief for conctinued trespasses by a third person upon the property of the complainant. The fact that a corporation is part of un illegal combination or trust cannot justify the spoilration of the property which belongs to it by third persons. "to invoke the protection of the Court against trespass" and infringement." (98 Fed. 621).

The single decision to the contrary is

National Harrow Co. v. Quick, 67 Fed. 130 (C. C., Ind.),

a patent infringement case holding that a patent owner's violation of law shields the infringer; but the opinion on this point is a more dictum, the case being decided on the ground that the defendant did not infringe the plaintiff's patent (67 Fed. 184). On appeal to the Circuit Court of Appeals for the 7th Circuit (National Harrow Company v. Quick, 74 Fed. 286) the decree was affirmed by Justices Woods, Jenkins and Showalter distinctly on the ground of non-infringement, Justice Woods saying at the opening of the opinion (p. 289):

"While not prepared, in view of the authorities, to sance "then the proposition that the infringer of a patent may "escape liability by showing that the legal owner is engaged "in a supposed unlawful combination or trust, we do not "consider the point. We think the dismissal of the appeal "justified upon other ground."

It is no answer to the decisions we have cited to say that the claim here made by the defendants—that no title to the patents passed because of the illegal agreement—was not made in any of the decided cases. It is true that except in Otic Riccator Company v. Geiger, 107 Fed. 181, no such claim was made in terms. In that case, however, the sawer alleged a combination of patents contrary to the Sharman Law, and asserted that "by reason thereof "no title enforcible in a Court of equity has been or now

"is vested in the complainants." On this point Judges Evans says:

"As there is no doubt that the conveyance of this patent "was in fact made and recorded, it seems to the Court that "the defendant, under those circumstances and in an action "of this character, cannot be allowed to question the title "of the complainant to the patent upon this ground, and "the weight of the authorities supports this view." (107 Ped. 133).

The failure in the other cases to plead in words the want of title would seem to be of no importance. A defense setting up a violation of law as a bar includes a necessity whatever defect of title may result from the violation.

A consideration of the statute and of the decisions to which we have called attention shows that the title to the ambiect-matter of executed contracts made in contravention of that law neither remains in the grantor nor becomes abandoned to the casual bystander, but passes to the person designated in the instrument. The law leaves the parties to an executed illegal contract where it finds them, but it does not throw open to the public the property on which the contract operates so that strangers to the title may acquire ownership by simply taking possession. Any recognition by the Courts of the right of an intruder at his whim is trespass upon or appropriate to himself the property of another for taint in the title fosters confusion. disorder and lawlessness and destroys the security which a good government ought to afford to its citizens. On this account the same enlightened public policy that prevents the enforcement of illegal contracts between the parties shields the title under executed illegal contracts against invasion by inermeddlers.

This Decree in the Creamery Company's Patent Suit.

This suit was brought to prevent Virtue and the Parmine Mill Company from intengence three patents of the Creamony Company (pp 194-147). The Interlocatory decree (Brinth) (1) o defendant answer, pp. 101-168) adjudged that all three of these patents were good and valid, and that Virtue and the Panning Mill Company had infringed and were infringing two claims of one patent and one claim of each of the others by their "manufacture, sale and use "of combined churus and butter-workers embodying the "Inventions disclosed and claimed in the above identified velatina of said patents" (p. 162-c). This decree was made on January 20th, 1907. The defendants appealed from the decree to the Court of Appeals, and the cause was pending here until January 1906, when it was dismissed for want of prosecution (pp. 152-b, 198-b). The injunction in this mit prevented the plaintills from continuing the business of manufacturing churms which they had theretofore carried on at Owatoms (pp. 516, 553, 557-a). They could not manufacture without infringing the Oreamery Company's patents.

1. The plainties suffered no banage by the succonstil prosecution of the suit against them.

In proper legal proceedings before a competent Court (the very Court in which this suit was being tried) the Cremnery Company proved that these plaintiffs infringed its patents and obtained an injunction against the continuous of their wrongloing. The decree was interlocu-

tory it is true, but it determined the rights of the parties up to the present time. The plaintiffs have had their day in Court and an adjudication in due course has been made against them. It is inconceivable that they can suffer any damage from a suit in which they have been defeated.

In Ganolly v. Union Sewer Pipe Company, 184 U. S. 540, it is said, quoting with approval from Strait v. National Harrow Company, 51 Fed. 819:

"The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial in uity, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his elegal rights. The exercise of the legal right cannot be affected by the motive which controls it.' Kiff a Youngars, 86 N. Y. 329." (184 U. S. 546).

The matter was put tersely by the trial judge.

"It seems to me that having brought the action which it "(the Oreamery Company) did, and having proved the "infringement of that patent, the party who is defeated "cannot maintain an action against this Company to resource all the costs and expenses which it had incurred "in the unsuccessful defense of the action, or three times "that amount according to the complaint. The reason why "these damages were suffered by Mr. Virtue was not this "unlawful combination, but the act of infringement by "bimself. If he had not infringed the patent he would not "have suffered any damages." (pp. 565-c, 566-a).

But the second control of the second second

2. THE STOTEM OF REMINDIES APPLIED IN FEDERAL COURTS DOES NOT PREMIT A PENDING SUIT IN EQUITY TO SE THE AS A GROUND OF RECOVERY AT LAW.

The attempt of the plaintiffs here to abandon the equity suit in which they are thus far unsuccessful in their defense, and set up a prosecution of that suit as a cause of action at law, could result only in bewilderment and wrong. The orderly administration of justice requires (with a few exceptions under the law of injunction and other extraordinary remedies) that litigation should be continued before the tribunal in which it is brought until it is terminated by the judgment of the Court. Any other course leads to confusion worse confounded. In this case, for example, if the plaintiffs should succeed and recover the treble damages which they seek, there would still remain the inf ingement suit in which a final decree in the same terms as the interlocutory decree may be entered. Then there would be a permanent injunction by a Court of competent jurisdiction, restraining these plaintiffs, because infringers, from manufacturing their churn at Owatonna, and there would also be (on the assumption we are making) a judgment at law by the same Court, still of competent jurisdiction, mulcting these defendants in treble damages for obtaining the very decree to which they are justly entitled. No argument is needed to show that a claim so perverse and topsy-turvy cannot be sustained.

8. The Plaintippe are in pact producting a suit for malectous prosecution in deplance of the Rule that such a suit is not maintainable unless the primary suit has terminated in their pavor.

Under the Sharman Law the injury counted on must be

of a kind actionable at common law. The statute dose not override the rules as to domnum chaque injuria. There are many losses,—each, for example, as those arising from trade competition, lawful combinations, the control and disposition of one's own property, malicious prosecution with probable cause—for which the law furnishes no remedy. As was said by the Circuit Court of Appeals of the Eighth Circuit, speaking of the Sherman Law, in—

Whitwell v. Continental Tobacco Co., 125 Fed. 454, at page 461:

"Now, no act or omission of a party is actionable, no "act or omission of a person causes legal injury to another, "unless it is either a breach of a contract with, or a duty "to, him. The damages from other acts or omissions form "a part of that damnum obsque injuris for which no action "can be maintained or recovery had in the Courts."

We cite other like rulings:

The Constitution of Pennsylvania requires compressation to be made "for property taken, injured or destroyed." The word "injured" is held to mean "such a legal wrong "as would be the subject of an action for damages at consumon law."

Pennsylvania R. R. Co. v. Marchant, 119 Pa. 561; 13
Atl. Rep. 690.

Under the Civil Damage Act of Vermont the word "injury" is "used in the sense of unlawful damage or hurt."

Broith v. Wilcow, 47 Vt. 537, p. 545.

A Virginia statute provided that "any person injured "by the violation of any statute may recover from the "offender such damages as he may have sustained by reason "of the violation, although a penalty or forfeiture for such "violation be thereby imposed, unless the same be expressly "mentioned to be in lieu of such damages." It was held

that the right thus given must be construed in accordance with common law principles, and if the facts show no injury at common low the statute is inapplicable.

Hortenstine v. Virginia-Carolina Ry. Co., 102 Va. 914, 47 S. E. Rep. 906.

Consolly v. Western Union Telegraph Ca., 100 Va. 51; 56 L. R. A. 663, p. 669.

The same conclusion was reached in

Tyler v. Western Union Telegraph Co., 54 Fed. 634.

In short no one is *injured* by the violation of a statute unless, in addition to the violation, he can show a wrong actionable at common law.

Plaintiffs have pleaded an alleged cause of action for malicious prosecution, and have shown in the pleadings that the suit said to have been prosecuted maliciously has not terminated in their favor. This admission is fatal at common law. There is no cause of action for malicious prosecution unless the plaintiff pleads and proves that the suit of which complaint is made has "terminated in favor "of the prosecutor" (Orescent Live Stock Co. v. Slaughter House Co., 120 U. S. 141, pp. 147-8). The State decisions are unanimous on this subject (26 Oyc., 55). The pleadings being insufficient at common law must also be insufficient under the statute.

## TOPIC VII.

# The Owatenna Manufacturing Company's Patent Suit.

The Owatonna infringement suit resulted in a decree (Exhibit "D-4," p. 124) that the patent in suit "was void for lack of invention, in view of the prior art, as to all "claims thereof counted on by the complainant in this 'cause." There was no injunction in that suit and no interference with person or property.

1. According to the weight of authority and enason a suit for the malicious prosecution of a civil action is not maintainable unless there he an interpresence with preson or property.

The right of a successful defendant to sue for malicious prosecution without interference with person or property has been much discussed in the State Courts and to a less extent in the Federal decisions. The right to maintain such a suit is denied (following the English authorities) in Georgia, Illinois, Iowa, Maryland, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Washington and Wisconsin. On the other hand the action is held to be maintainable in California, Colorado, Connecticut, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Tennessee and Vermont.

The attitude of the New York Court of Appeals seems to be one of doubt:

Willard v. Holmes, 142 N. Y. 492; 37 N. E. 480.

Burt v. Amith, 181 N. Y. 1; 73 N. E. 495.

The difference of opinion is stated and the cases collected in

- 21 Am. Law Reg., 281-353 (Article by John D. Lawson reviewing authorities to 1878).
- 93 Am. St. Rep. 466-469 (Article by A. C. Freeman reviewing authorities to 1902 in a note to McCormick Harvester Machine Co. v. Willan, 63 Neb. 391; 88 N. W. 497).
- 4 Ourrest Law, pp. 472-474 (Article by George F. Longsdorf reviewing authorities to 1904).
- 19 Am. dEng. Bncy., 652, 653.

26 Cya., pp. 14-16.

The reasons for denying the right of action are fully re-

viewed and found sufficient in the following cases:

Wetmore v. Mellinger, 64 Ia. 741; 18 N. W. 870 (followed in Dorr Cattle Co. v. Des Moines National Bank, 127 Ia. 153; 98 N. W. 918).

Smith v. Michigan Buggy Co., 175 III. 619; 51 N. E. 569.

Potts v. Imlay, 4 N. J. L. 877.

Luby v. Bennett, 111 Wis. 613; 87 N. W. 804.

This last case, while discussing the law elaborately, does not decide the point.

The fullest statement of the reasons to the contrary is found in a vigorous opinion by Corliss, C. J., in

Kalka v. Jones, 6 N. D. 461; 71 N. W. 558.

We have found only the following decisions in the Federal Courts:

Burnap v. Albert, 4 Fed. Cas. 761 (No. 2170).

Cooper v. Armour (C. C., N. Y.), 42 Fed. 215.

Bishop v. American Preservers Co. et al. (C. C., Ill.), 51 Fed. 272.

Wade v. National Bank of Commerce (C. C., Wash.),
114 Fed. 877.

Tamblyn v. Johnston (C. C. A., 8th Circ.), 126 Fed. 287, 270.

Wilkinson v. Goodfellow-Brooks Shoe Co. (C. C., Mo.), 141 Fed. 218.

The principal case is Tomblyn v. Johnston. It is there mid by Judge Thayer:

"According to the great weight of authority and reason, "no action will generally lie for the institution and prose"cution of a civil suit, even if it is brought and prosecuted "maliciously and without any probable cause. In such "cases the liability of the plaintiff for the costs which he "thereby incurs is deemed a sufficient penalty for the

"wrong. But when the plaintiff, who brings such an action, "procures the arrest of the defendant or the science of his "property under a writ of attachment, and thereby indicts "special damages, such as do not ordinarily result from the "institution of a civil suit, a wrong is committed, on "account of which the law will afford redress in an action "on the case" (126 Fed. 270).

Even excluding the English cases, the weight of authority is against the action. It is true that the greater number of States permit such suits, but on the other hand, the States that deny the recovery include large commercial centers,—Illinois, Ohio and Pennsylvania.

The reasons urged on each side of the question are simple. The theory of those who favor the suit is that one who prosecutes a civil suit maliciously and without probable cause has done a wrong for which there should be redress in damages. Those who oppose the suit say that only such loss has been suffered as is incidental to the administration of justice, and that this is a loss without injury.

Here is the turning point of the discussion. The successful plaintiff does not obtain full compensation for what he has lost through the necessity of obtaining his rights by litigation. The costs allowed by law are inconsiderable and are not measured in any degree by the actual damage. If the theory of the law were to make full compensation on both sides, the action would be well grounded; but there is no such full compensation for the plaintiff who succeeds against a defense set up maliciously and without probable cause. Unless the suit is given even-handedly to both plaintiff and defendant, it should be given to neither; and it is no answer to say that the defendant may well be permitted to recover even though the machinery of the law is not sufficient to give a like remedy

against him. The circumstances are the same and the rule should be the same, whether the offender be prosecuting or defending. If an unsuccessful defendant escapes unscathed, no matter how groundless or malicious or wanting in probable cause his defense may be, the plaintiff ought in justice to be dealt with in the same way. We submit that not only authority, but reason as well, is in favor of denying the action to the defendant for a tortious prosecution until it is given to plaintiff for a tortious defense.

A though the Supreme Court of Minnesota permits the action, the rulings of that Court as to whether or not the right of action exists at common law are not binding in this Court. The Federal Courts will determine this question for themselves, independently of the State decision, unless some statute modifying the common law intervenes. (Western Union Telegraph Company v. Call Publishing Company, 181 U. S. 92, p. 103; Murray v. Chicago dc. Railway Company (C. C.), 62 Fed. 24).

2. EVEN IN JURISDICTIONS WHERE A SUIT MAY BE MAINTAINED WITHOUT INTERPRESENCE WITH PERSONS OF PROPERTY THE WANT OF PROBABLE CAUSE MUST BE VERY CLEARLY PROVEN. THERE IS IN THIS CASE NO EVIDENCE AT ALL OF WART OF PROBABLE CAUSE.

The rule in jurisdictions where the action is maintainable is clearly stated in

Bickhoff v. Fidelity &a. Co., 74 Minn. 139.

It is there said by Chief Justice Start:

"However, the want of probable cause must be very pal"pable. A greater latitude in the doctrine of reasonable
"cause must be exercised in such cases than would be
"permissible in an action for maliciously prosecuting a
"criminal case. Before a party can justly be held liable

"for maliciously prosecuting a civil action, where there "was no interference with the person or property of the "defendant, want of probable cause must b very clearly "proven. Bigelow, Torts, 78; Newell, Mal. Pros., 85. This "rule is sustained by principles of justice and public policy. "To compel a party who brings a civil action and fails to "maintain it to pay the costs is, as a rule, all that a precutical administration of justice requires, and is usually "sufficient to make him cautious about bringing such suits." Any other rule would make litigation interminable. "Cooley, Torts, 207." (74 Minn. 142).

To the same effect is

Ferguson c. Arnow, 142 N. Y. 580, p. 588.

This case involved an arrest of the defendant in the primary action. As to the degree of proof Earl, J., says:

"A party who brings an action for malicious prosecu"tion against a plaintiff who has been unsuccessful in a
"civil action, should not be permitted to recover without
"very clear and satisfactory proof of all the fundamental
"facts constituting his case. Such actions should not be
"encouraged.

"The costs awarded to a successful defendant in a civil faction are the indemnity which the law gives him for a figroundless prosecution. Public policy requires that parties may freely enter the courts to settle their grievances, and that they may do this without imminent exposure to a suit for damages in case of an adverse decision by judge for jury." (142 N. Y. 588).

The same or a even greater intensity of proof is required when a patent is challenged. The patent is of itself prime facis proof that the patentee was the original and first inventor, and the one attacking it has a much greater burden than merely producing a preponderance of evidence against it.

We quote from some of the cases:

"Tower to grant letters patent is conferred by law upon "the Commissioner of Patents, and when that power has "been lawfully exercised, and a patent has been duly "granted, it is of itself prima facie evidence that the pat"enter is the original and first inventor of that which is "therein described, and secured to him as his invention." (Seymour v. Osborne, 11 Wall. 516, 538).

"The invention or discovery relied upon as a defense "must have been complete, and capable, and capable of "producing the result sought to be accomplished; and this "must be shown by the defendant. The burden of proof "rests upon him, and every reasonable doubt should be "recolved against him." (Coffin v. Ogden, 18 Wall, 120, 124).

"The burden of proof is upon the defendants to establish this defense (of prior use). For the grant of letters "patent is prime facie evidence that the patentee is the "first inventor of the device described in the latter's patent "and of its novelty. " " Not only is the burden of proof "to make good this defense upon the party setting it up, "but it has been held that 'every reasonable doubt should "be resolved against him.' " (Controll v. Wallick, 117 U. S. 680, p. 495).

"Courts have not only imposed upon defendants the bur"den of proving such devices" (unpatented devices claimed
to be complete anticipations), "but have required that the
"proof shall be clear, satisfactory and beyond a reasonable
"doubt." (The Barbed Wire patent, 143 U. S. 275, p. 284).

"As we have had occasion before to observe, oral testi-"mony, unsupported by patents or exhibits, tending to "show prior use of a device regularly patented, is, in the "nature of the case, open to grave suspicion. (The Barbed "Wire Patent, 143 U. S. 275). \* \* \* This case is an apt "litustration of the wisdom of the rule requiring such anti-"cipations to be proven by evidence so cognent as to leave "no reasonable doubt in the mind of the court, that the "transaction occurred substantially as stated." (Decring v. Winona Harvester Works, 155 U. S. 286, p. 300).

The patent of the Owatonna Manufacturing Company though declared "void for lack of invention in view of the "prior art as to the claims counted on" (p. 124) was presumptively valid, and was therefore probable cause for the suit. There was a total failure of proof to overcome this prima facie case. Indeed there was no evidence at all showing a lack of probable cause. The only part of the trial bearing on that subject is found in two offers, both excluded by the court. The first one is this:

"We offer to prove that the mechanism disclosed in and "covered by the Howe, Ames and La Bare patent, under "which the so-called two speed case was brought by the "Owatonna Manufacturing Company against the defend-"ants D. E. Virtue and the Owatonna Fanning Mill Com- "pany was for a mechanism which had been disclosed to "said Howe, Ames and La Bare, by Reuben B. Disbrow and Darius W. Payne, and was put into a machine which "was ultimately made by the Owatonna Manufacturing "Company in accordance with the directions of said Beu"been B. Disbrow; and that said T. J. Howe and the officers of the Owatonna Manufacturing Company knew at the "time they instituted this suit against said defendants that said patent was void, and was something which had "been communicated by others." (pp. 551-c, 552-a).

The other ofter is as follows:

"I also offer to prove that they knew that said Howe,
"Amou and La Bare were not inventors, but that the same
"had been communicated by said Reuben B. Disbrow and
"Drive W. Payne and that they purposely and intentionally appropriated the rights of the inventors, and pro"cured a patent un the same, surreptitiously and contrary
"to less; and that they knew that this patent was void
"when they instituted this suit." (pp. 552-b).

e offers were properly overruled for these reasons: (1) There being no time fixed, the supposed communication might have been after the discovery or invention had been perfected by Howe, Ames and Le Bare; (2) the offers do not propose to show that the officers of the Owatonna Manufacturing Company acquired the knowledge referred to as a part of the business of that Company or had it "in "mind" at the time the infringement suit was begun or while it was in progress (The Distilled Spirits, 11 Wall. 366. p. 367; American Surety Company v. Pauly, 170 U. S. 133, p. 155; Brown v. Cramberry &c. Company-C. C. A., 4th Circ.-72 Fed. 96, p. 101); (3) the offers do not propose to show who the supposed inventors are, or that the third person (for whose invention Howe, Ames and Le Bare procured a patent, "surreptitiously and contrary to law") was "using reasonable diligence in adapting and "perfecting the same" (R. S. U. S., §4920). "It is quite "clear that the charge that the original patentee " \* " "fraudulently and surreptitionaly obtained the putent for "that which he well knew was invented by another, unac-"companied by the further allegation that the alleged first Anventor was at the time using reasonable diligence in "adapting and perfecting the incention, is not sufficent "to defeat the patent and constitutes no defense to the

"charge of infringement" (Agassam Woolen Campany v. Jordan, T Wall. 583; Reed v. Cotter, 1 Story, 590, 20 Fed. Can. 435; Warren Bros. Company v. City of Oscosso—C. C. A., 6th Circ.—166 Fed. 309, p. 315); and (4) neither offer showed any of the particulars of the supposed invention or of any of the facts from which priority of invention could be inferred, and both proposed proof of the legal conclusion that the patent "was void". (King v. City of Duluth, 81 Minn. 182; Martin v. Herts, 224 Fil. 84; 38 Cyc. 1333-4)

If all that was offered were in fact proved, the burden resting upon the plaintiffs would not have been met and the case would still stand barren of evidence that the Owatonna Manufacturing Company's infringement suit was brought without probable cause.

3. EVEN IF THE PROSECUTION OF THE OWATONNA MANU-FACTURING COMPANY'S SUIT CONSTITUTED AN ACTIONABLE INJURY, SUCH INJURY DID NOT ARISE FROM ANYTHING POS-BIDDEN OF DECLARED UNLAWFUL BY THE SHERMAN ACT.

On this subject we cite only what is said by the trial court and the Court of Appeals. In sustaining the objection to the evidence offered as to damage (p. 557-c) the trial judge says at the outstart that he would "assume "for the purposes of this decision that this contract of "February 24th, 1898, was a contract in restraint of trade "and to create a monopoly" (p. 565-a); then, coming to the matter of the Owatonna Manufacturing Company's suit, he says:

"At any rate there is no evidence which would justify
"a jury in finding that the Owatonna Manufacturing Com"pany entered into any combination or contract with any

"one that was in violation of either Section 1 or Section 2
"of the Act, so that the Creamery Puckage Manufacturing
"Company cannot be held liable for the failure of the
"Owatonna Manufacturing Company to maintain its
"action, and it cannot be held responsible, although it may
"have entered into an unlawful conspiracy with other per"sons, for it has not entered into such conspiracy with
"the Owatonna Manufacturing Company" (p. 566-c).

On the same subject the Court of Appeals, in adopting the view of the trial court, says:

"It is not necessary in the disposition of this case to de "termine the question whether or not the contract of Peb"rnary 24, 1898, between the Creamery Manufacturing "Company and other concerns and individuals, to which "the Owatonna Manufacturing Company was not a party, "violated the provisions of the Act of Congress. We may "assume, however, for the purposes of this case, without "deciding the question, that it was a contract in violation "of the statute. We then have a case where two suits are "brought, one by a party to a lawful agreement, the other "by a party to an unlawful agreement, for the infringe-"ment of patents owned by them respectively, and where "both parties were doing nothing more than exercising "their legal rights" (179 Fed. 119).

4. THE COMPLAINANTS HAVE WAIVED THEIR RIGHT TO THE PENALTY UNDER THE SHEEMAN LAW BY BRINGING SUIT IN THE STATE COURT FOR MALICIOUS PROSECUTION.

In November, 1907, the plaintiffs brought action against these defendants in the District Court of Steele county, Minnesota, for malicious prosecution of the Owatonus Manufacturing Company's patent infringement case (pp. 154, 155, 164-169—complaint and answer in the Steele County case). Taking the allegations of the answer and reply in the present case together (pp. 155, 166, 199) it appears that the Steele County case came to trial in December, 1907, before Judge Buckham; that the trial was contested; that the action was dismissed on defendant's motion after all the evidence was introduced and that on June 11th, 1908, judgment was entered that the plaintiffs pay defendants therein \$12.60 costs and disbursements; that a proposed case was settled and allowed on July 10th, 1908; that the judgment is unappealed from and unreversed, and that the time to appeal has passed.

In the complaint in the present suit the plaintiffs say that they had no knowledge as to the alleged violation by defendants of the Sherman Law "prior to one year and "six months before the bringing of this action" (p. 37, par. 56). This action was begun on December 11th, 1908. Accordingly at the time of the commencement of the Steele County suit in November, 1907, the plaintiffs knew what they set up in their complaint in this suit, and with that knowledge brought their Steele County action, compelling a defense and resulting in a judgment for costs, which in Minnesota is the equivalent of a judgment of dismissal (Actna Insurance Co. v. Swift, 12 Minn. 437, p. 445).

This constituted a waiver of the right to claim the penalties provided by the Sherman Law. The case presents one phase of the doctrine of the election of remedies. The adoption of one of two or more inconsistent remedies is a final choice and prohibits the party from afterwards resorting to another alternative remedy. (7 Bucy. Pl. & Pr., 364; 15 Cyc. 200). The same doctrine is found in

Robb v. Vos, 155 U. S. 13.

Bierce v. Hutchins, 205 U. S. 340, p. 346.

Klipstein & Co. v. Grant, 141 Fed. 72. Water Light & Gas Co. v. City of Hutchinson, 160 Fed. 41.

In Bierce v. Hutchins, supra, it is said: "Election is "simply what its name imports, a—choice shown by an "overt act between two inconsistent rights, either of which "may be asserted at the will of the chooser alone." (205 U. S. 346).

Here the Sherman Law offered a remedy highly punitive in its nature, which might be adopted or not at the litigant's choice. It was inconsistent with the ordinary remedy at common law in that it allowed a recovery of treble damages. A person deeming himself injured by a violation of that law was not bound to pursue the statutory remedy. He could refuse the tempting prize of a treble recovery because of the additional evidence required as a condition precedent, and instead could take the lesser recovery with a diminished burden of proof. Having once made the choice and put the opposing parties to the burden of a defense of the suit at common law, he is thereafter precluded from going back and electing again. (Thompson v. Howard, 31 Mich. 308, at p. 312).

#### TOPIC VIII.

## The Alleged Threats.

We collect the evidence on this subject.

In March, 1904, Mr. Rice, the Minneapolis Manager of the Creamery Company, told Crickmore, the Secretary and Manager of a local company, that his Company "was tak-"ing chances if it bought Mr. Virtue's churn" (p. 354-a); "that we would get into trouble if we took that churn" (p. 354-c), and for this reason they refused to take the Virtue churn that they were going to take, and bought the Disbrow churn from the Creamery Company instead (p. 355-b).

The witness Lawson was a butter-maker in a creamery in Steele county,—the purchaser of a Virtue churn. In the summer of 1904 a traveling agent for the Creamery Package Company told Lawson (as he testifies) that "we "were liable to get into trouble if we continued to use the "Owatonna churn, as it was an infringement on their "churn" (p. 447-a).

Strandemo, another witness, testifies to a conversation at the same time, which he puts in July, 1904 (p. 449-c). His talk was with Stone, an agent of the Creamery Com"pany. The witness reports that Stone said that we had "bought the wrong churn. He said we were liable to get "into trouble because we had bought that churn, and the "reason he had for saying this was this: He said that that "infringed on their patent, and we would be liable to get "into trouble on that account" (p. 449-b). This was the same churn referred to by Lawson.

The witness Monroe, as agent for J. G. Cherry & Company, had sold some of the Owatonna churns in 1904 (p. 468). In July of that year he had a controversy with Woodring, an agent of the Creamery Company, with regard to a churn that was bought by the Coon River Creamery (pp. 470, 471). Woodring then stated that the defendant had instituted or was about to institute proceedings against the Fanning Mill Company for infringing the Disbrow patents, and that if the Coon River Creamery used the Fanning Mill churn it would be sued for infringement (p. 472). Monroe is not clear as to what patents Woodring mentioned. In his first statement he speaks of the Dis-

brow patents (p. 472). His second statement is that the churn infringed the patents owned by the Creamery Package Company (p. 481-a). His third statement-a correction of the second-is that the Fanning Mill churn was said by Woodring to be "an infringement on the Disbrow "patents owned by the Creamery Company" (pp. 486-c, 487-a and b). Monroe, however, guaranteed the Coon River Company against litigation without specifying the Disbrow churn (p. 486-b). He learned afterwards from another agent of the Creamery Company that the suit had been brought (p. 482-c). Monroe gave up selling the Fanning Mill churn because his competitors "laid down "on him too hard" (p. 473) by threatening law suits for infringement (p. 474). There had been a Disbrow churn in the Coon River Creamery (p. 476-b) and the relations between Woodring and the witness were rather strained (pp. 471-c, 477-a). After this controversy at Coon River, Monroe began selling the Simplex churns and sold about sixty of them, and testifies that there were about twentyfive hundred of these churns in use (p. 478-c). No threats of infringement suits were made and no suits brought against the Simplex (p. 478-a). Monroe heard rumors about suits by the Creamery Company against the Fanning Mill Company, but he is unable to separate rumors that a suit was to be begun from those that a suit had been begun (p. 483-a), nor could be separate rumors that the suit was being instituted for infringement of the Disbrow churn from rumors that patents of the Creamery Company were being infringed (pp. 485-a, 486-b). The rumors were that the Creamery Company would bring or had brought a suit for infringement of patents that belonged to it (p. 486-c).

The witness Ladd sold a few churns early in the year 1905 (p. 451-b). Shortly after he sold the first one, in March or April (p. 463-a), he received a letter from Paul & Paul in substance (the letter not being produced) that "the Creamery Package Manufacturing Company or the "Owatonna Manufacturing Company were suing the Owa-"tonna Fanning Mill Company for an infringement on "their patent (patents)." The witness adds, "and they "warned me against selling those machines to the trade, "giving me to understand that they would proceed against "me; they would hold me liable as well as hold "the users of the machine liable for any damages that "might be incurred" p. 453-c). Ladd also saw a letter written to another creamery to much the same effect. About this time the claim that the Owatonna Fanning Mill church (the Owatonna churn) was an infringement was quite generally known in the creamery trade (p. 456-c). After receiving Paul & Paul's letter the witness wrote asking what their claims were. In reply they "cited," as the witness remembers it, "their "claim covering a back gearing or two-speed gear for "combined churn and butter-worker" (p. 457-b). He says also, "I do not remember the name" (of the patents mentioned by Paul & Paul as being infringed) "but I am under "the impression that one was the patent covering the two "speed or back gear, and that there was some other patent "mentioned, but as I remember it, it was described by "number \* \* \* I am under the impression there were three" (p. 464-a). The witness' final recollection is that there were at least three patents mentioned (p. 464-a) by Paul & Paul. [The Owatonna infringement suit was based on a single patent (p. 105, par. 5); the Creamery Company's infringement suit was based on three (p. 130, pars. 313)]. He believes that Paul & Paul in their letters spoke of "their climats," and he "believes" that they named the Owatonna Manufacturing Company, but he is "not sure" that they named the Creamery Company (p. 464-c).

Barlass, another witness, was employed from March, 1902, to March, 1906, by the National Creamery Supply Company (p. 504-a), a company engaged in substantially the same kind of business as the Creamery Package Company (p. 514-a). While he was serving that company he made sales of the churn made by the Owatonna Fanning Mill Company, but discontinued about the beginning of 1905 (p. 507-a and b), when he substituted the Simplex for it because he was unable to make sales of the Owatonna churn (p. 507-c). "Our salesman," says the witness, "reported that where they were figuring or quoting "an Owatonna churn the customer had brought up the "point that he had been advised from other salesmen or "other souces that the Owatonna was an infringement on "another churn or churns, and that he would be liable to "be sued for infringement if he bought and used one" (p. 508-a). "All I know about this is that wherever we were "competing to sell an Owatonna churn the customer seemed "to be well informed about the suit or suits which had been "brought against the Owatonna churn" (p. 508-c). "We "didn't receive any demands (for guaranties) that I know "of from purchasers, but the question nearly always asked "by prospective buyers was, 'would we guaranteee them "against any trouble which might arise from the infringe-"ment suit?" (p. 509-a).

The matters here complained of may be divided into three classes,—(A) Warnings against infringement at about the time the suits were brought; (B) warnings against infringement after the suits were begun; and (C) the effect of the suits in deterring purchasers.

1. A PATENT OWNER IS JUSTIFIED IN WARNING INFRINGERS
UNLESS THE WARNING IS IN BAD FAITH. THERE IS NO EVI-

A patent owner may notify infringers of his claims and threaten them with a suit unless they desist. If he does this in good faith, believing his claims to be valid, and brings his suit with reasonable diligence he is acting within his rights and incurs no liability.

Kelley v. Ypsilanti Dress-stay Mnfg. Co., 44 Fed. 19 C. C., Mich.).

Computing Scale Co. v. National Computing Scale Co., 79 Fed. 962 (C. C., Ohio).

Farquhar Co. v. National Harrow Co., 102 Fed. 714 C. C. A., 3d Circ.).

Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827 (C. C. A., 2d Circ.).

Warren Featherbone Co. v. Landauer, 151 Fed. 130 (C. C., Wis.).

Dittgen v. Racine Paper Goods Co., 164 Fed. 84 (C. C., Wis.).

Mitchell v. International &c. Co., 169 Fed. 145.

Both the American and English cases are collected in 30 Oyc., 1054.

As was said in Computing Scale Co. v. National Computing Scale Co., supra, "If the right to sue exists, the "right to warn by letters or by circulars or by advertise-"ments in newspapers exists and cannot be enjoined" (79 Fed. 966). The limitation on the right is the requirement of good faith.

In this case there was no intimation that any of the warnings were made in bad faith. Those given to Crickmore, Lawson and Strandemo referred solely to the Creamery Company's patents and were immediately before the suits (pp. 354, 447, 449). The warning to Monroe was given at about the same time—July, 1904 (p. 473-a). Much stress is laid on Monroe's uncertain and wavering statement (pp. 472-a, 481-a, 486-c) that the Creamery Company's agent told him that the Disbrow patents were being infringed. Evidently that matter made no impression on Monroe at the time, for the guaranty he gave was against law suit "brought by the Creamery Package Company for "infringement on the Owatonna churn" without specifying the Disbrow patents (p. 487).

The letters to which Ladd testifies came to him in March or April, 1905 (pp. 451-a, 463-b), and referred to both suits, although Ladd's memory is clearer as to the suit of the Owatonna Manufacturing Company than it is about the Creamery Company's suit. This circumstance, too, is referred to persistently in the plaintiffs' brief as being a notification only in regard to the Owatonna churn as if Paul & Paul, representing the complainants in two suits for infringement of the same churn, invidiously selected the patent named in one suit and omitted the three named in the other; but in fact Ladd says that the letter named at least three patents, and is not positive that there were no more (p. 464-a). This means that the letters undoubtedly referred to the one patent in the Owatonna Manufacturing Company's suit (p. 5, par. 5) and the three in the Creamery Company's suit (pp. 125-130).

The notification to Barlass came in the beginning of 1905 (p. 507-b). As to the testimony of this witness, the plaintiffs' counsel also catch at one phrase where the witness

says, "There was considerable question among the trade "about whether the Owatonna was an infringement on the "Disbrow churn patent"; but whatever question there might have been on this subject was eliminated, when the witness states his knowledge in detail. He does not mention the Disbrow churn, but describes the suits then pending as being on the claim that the "Owatonna was an in-"fringement on another churn or churns" (p. 508-a).

The evidence shows beyond doubt that the notifications were given in good faith in connection with litigation about to be begun or then pending. The injunction granted in the interlocutory decree in the Creamery Company's case prevented the further manufacture or sale of the so-called "Owatonna" or "Virtue" churn,—the very churn which the persons to whom the warnings were given were either using or selling. This was a complete justification for the warnings, even though the Owatonna Company failed in its suit. If the plaintiffs were making and selling, and the persons to whom the notices were given were buying and using, a churn that infringed the three patents owned by the Creamery Company, it cannot be of moment that they did not also infringe the single patent owned by the Owatonna Manufacturing Company.

It was also claimed by plaintiffs' attorneys that threats were made against the Perfection churn. As to this matter we cite simply the single paragraph on that subject in the evidence. Ladd, speaking of a conversation early in 1908, with a representative of the Creamery Company, in which the latter made statements as to the Perfection churn, testifies: "He did not state positively that they "were infringing a patent, but expressed himself as of the "opinion that they were infringing a patent of a single "roller churn which the Creamery Package Co. he claimed

"had built some years previously. And that if this was "the case of course his Company would prosecute the pat"ent" (p. 462-c).

To this may be added the testimony of Monroe that although the Simplex churn was a successful and growing one, and was taken up by him immediately after he ceased selling the Owatonna or Virtue churn, he "did not meet "with any threats of infringement suits by the Creamery "Package Company in the sales of the Simplex" (p. 478-a). In brief, the evidence so far from justifying an inference of bad faith in the warnings, requires the contrary conclusion that they were given in good faith, in the belief that the patents were valid and that the persons notified were in fact infringers.

We need say only a word as to the effect of the pendency of the suits in deterring the purchase of the churn claimed to be an infringement. The patent owner has the right to appeal to the court for the protection of his patent. Sometimes the exercise of this right carries with it a damage in lessening the sales of the challenged device made or used by the defendants. Such damage is an incident of the suit and cannot be made the ground of a recovery.

On this topic what is said in Kelly v. Ypsilanti &c. Co., 44 Fed., p. 19, describes forcibly the situation here:

"There is undoubtedly authority for holding that, if the "language of such letters or circulars be false, malicious, "offensive or opprobrious, or used for the wilful purpose "or inflicting an injury, the party is entitled to his remedy "by injunction; and this is the extent to which the authorities go. Hovey v. Rubber Tip Pencil Co., 57 N. Y. "119; Snow v. Judson, 38 Barb. 210; Emack v. Kane, "34 Fed. Rep. 46; Oroft v. Richardson, 59 How. Pr. 356;

"Wren v. Wield, L. R. 4 Q. B. 730. Upon the other hand, "it would seem to be an act of prudence, if not of kindness, "upon the part of a patentee, to notify the public of his "invention, and to warn persons dealing in the article of "the consequence of purchasing from others, and in such "cases an injunction has been uniformly denied. Chase "v. Tuttle, 27 Fed. Rep. 110; Boston Diatite Co. v. Flor-"ence Manufg. Co., 114 Mass. 69; Kidd v. Harry, 28 Fed. "Rep. 773. The language of the letters in the present case "is perfectly respectful and courteous, and while the cir-"cular is a distinct and firm assertion of the patentee's "rights, there is nothing in it to which the person receiving "It can take a just exception. Nor is there anything to "indicate that they were not written in good faith, and in "the belief that the plaintiff had rights under his patents "which he was entitled to protect by suit" (44 Fed. 23).

# 2. THE WARNINGS CONSIDERED AS A SEPARATE CAUSE OF ACTION WERE BARRED BY THE STATUTE OF LIMITATIONS.

The evidence shows that the first of the warning was given in the summer of 1904, and the last not later than July, 1905. This action was begun on December 11th, 1908 (p. a of record). The cause of action, if one exists, accrued therefore more than three years before the commencement of the suit.

In Chattanooga Foundry Co. v. Atlanta, 203 U. S. 390, the question arose as to the statute of limitations applicable to actions under the 7th section of the Sherman Law, the inquiry there being whether the law of Tennessee or Section 1047 of the Revised Statutes applied. It was held that the limitation of five years in this section did not control for the reasons stated in Huntington v. Attrill,

146 U. S. 657, p. 608, and Brady v. Daly, 175 U. S. 148, 155, 156. It was also held that a Tennessee statute providing limitation of one year "for statute penalties" was inoperative because it could not be distinguished from Revised Statutes Sec. 1047. Another section of the Tennessee law providing a three-year limitation "for injuries "to personal or real property" was also rejected, and the controlling limitation was found in a ten-year period in the Tennessee law for "all other causes not expressly pro"rided for" (203 U. S. 398).

The Minnesota statutes (Revised Laws, 1905) on this subject are:

"Section 4076. The following actions shall be "com-"menced within six years: (1) \*.\* \*; (2) Upon a liability "created by statute, other than those arising upon a pen-"alty or forfeiture.

"Section 4077. The following actions shall be "com-"menced within three years: (1) \* \* \*; (2) Upon a "statute for a penalty or forfeiture to the party aggrieved.

"Section 4078. The following actions shall be "commenced within two years: (1) \* \* \*; (2) Upon a statute for a penalty or forfeiture to the state.

"Section 4080. Every action upon a statute for "a pen"alty given in whole or in part to the person who prose"cutes therefor shall be commenced by such party within
"one year after the commission of the offense; but, if the
"action is not commenced within one year by a private
"party, it may be commenced within two years thereafter
"on behalf of the state by the attorney general or the
"county attorney of the county where the offense was com"mitted."

The Revised Laws of Minnesota were enacted in April, 1905, and took effect on March 1st, 1906 (\$5504). As

respects the sections that we have referred to, the only difference between the revision and the law in force for many years before, is that the predecessor of subdivision "2" of §4077 read as follows:

"2d. An action upon a statute for a penalty or for-"feiture where the action is given to the party aggrieved "or to such party and the state of Minnesota" (G. S. Minn. 1894, §5137).

The law as it existed before the revision of 1905 was construed in State v. Buckman, 95 Minn. 272. It was there held that the limitation in this subdivision applied to an action to recover for timber taken and converted by trespassers on lands owned by the state, where the state sought to recover the treble damages given by Chapter 163 of the Laws of 1905. These enhanced damages were held to be a penalty (95 Minn. 277).

The same section came before the court in State v. Bonness, 99 Minn. 392. The defendant there sought to apply to a similar action for timber trespass the limitation of two years re-enacted in Section 4070, R. L. 1905. In over-ruling this contention the court said:

"Manifestly the section relied on applies only to penal"ties and forfeitures created by the statute, and inflicted
"as punishment for an offense against the public and not
"to those imposed as an incident to the redress of a private
"wrong. We hold, following the case of State v. Buck"man, that the limitation of three years applies to this
"action" (99 Minn. 393).

The distinction between the Chattanooga Case and the one at bar lies in the different statutes of limitations provided by the local law. By the Tennessee statutes there were three limitations to be considered,—the limitation

of one year "for statute penalties," of three years "for "injuries to personal or real property," and of ten years for "all other causes not expressly provided for." The Minnesota statute has four limitations,—sia years for "a "liability created by statute other than those arising upon "a penalty or forfeiture," three years on "a statute for a "penalty or forfeiture to the party aggriced," two years on "a statute for a penalty or forfeiture to the state," and one year in qui tam actions.

In thus providing for cases other than those within the purview of the Tennessee law, the statutes of Minnesota make a clear distinction between "a liability created by a "statute" and an action "upon a statute for a penalty or "forfeiture." If there be merely a liability created by statute, the period of limitation is six years, but if the statute provides a penalty or forfeiture, the limitation is three years.

The cases cited in the Chattanooga Foundry decision,—Huntington v. Attrill and Brady v. Daly—were called to the attention of the Minnesota court in the Buckman case (95 Minn. 273). The Minnesota court nevertheless decided that the provisions in the Timber Trespass Act constituted a penalty within the meaning of the local statute of limitations. This statute, in view of the silence of the United States statutes, controls the limitation (Rev. Stat., §721), and the construction given by the highest tribunal in the state is adopted in this court. Balkam v. Woodstock Iron Company, 154 U. S. 177, quoting the following rule from Leffingwell v. Warren, 2 Black, 599, p. 603:

"The courts of the United States, in the absence "of legislation upon the subject by Congress, recog"nize the statutes of limitations of the several states, and

"give them the same construction and effect which are "given by the local tribunals. They are a rule of decision "under the 34th section of the Judicial Act of 1789. The "construction given to a statute of a state by the highest "judicial tribunal of such state is regarded as a part of "the statute, and is as binding upon the courts of the "United States as the text. \* \* \* If the highest judicial "tribunal of a state adopt new views as to the proper con-"struction of such a statute, and reverse its former deci"sions, this court will follow the latest settled adjudica"tions (154 U. S. 188).

#### TOPIC IX.

The Alleged Illegal Conspiracy Against the Sherman Law in the Concurrent Bringing of the Two Infringement Suits and in Giving Warning of Others.

In their brief, plaintiffs' attorneys (pp. 27-30) give a number of reasons for their claim that the two infringements were prosecuted together as a part of "the alleged "illegal claim of monopoly."

1. THERE IS NOTHING IN THE EVIDENCE TO SHOW THAT EITHER OF THE DEFENDANTS HAD ANY IMPROPER OR UNLAW-FUL CONNECTION WITH THE INFRINGEMENT SUIT BROUGHT BY THE OTHER.

The evidence is as follows: The two actions were begun on the same day, and the complainants were represented by the same patent attorney, Mr. Paul (p. 518-a and b). In some conversation about the suits between Mr. Paul and Mr. Williamson (the latter appearing for the defendants), Mr. Williamson said: "I don't see

"there would be any use in going on with these suits, we "would simply bust up all these patents and throw the "whole thing open to the public" (p. 540). After this interview there was a letter and a telegram from Mr. Paul to Mr. Williamson. In the letter he said,—"I am going to "Chicagi Wednesday night to consult with my elient in "reference to the churn suits. I will wire you from Chi-"cago." In the telegram he said,—"Will proceed with both "suits," Exhibits "6" and "7", pp. 572, 578).

During the taking of the testimony Mr. Williamson saw consultations between the representatives of the Owatonna Manufacturing Company and those of the Creamery Company (pp. 543, 544). He says that he observed some of these consultations "at times when we were taking testi-"mony, which (my recollections) only applied to one case" (p. 541-c). There was, however, a stipulation (Exhibit "D-3," pp. 573, 574), one of whose provisions was the following: "That all testimony taken in either of the two "above entitled cases" (the case of the Creamery Company and the case of the Owatonna Manufacturing Company against these plaintiffs) "may be read and used in the "other cause, so far as competent and pertinent thereto, "with the same force and effect as if taken directly therein" (p. 574-a). Accordingly Mr. Williamson admits that under the stipulation if the court had afterwards decided that this testimony had relation to the case other than in which it was taken, "then it might be used or admitted in "that case as soell" (pp. 547-c, 548-a). The only further circumstance that Mr. Williamson remembers is that during the course of the taking of the testimony he asked Mr. Paul,-"Is there anything you can rebut?" The following then occurred: "Then Mr. Paul smiled and then reddened "and he says, Well, you will have to fight us in the Cir"cuit Court of Appeals anyhow; you will meet us in the "Court of Appeals." (547-a).

In addition to this there was an assignment of the costs in the Creamery Company's suit to the Owatonna Fanning Mill Company (Exhibit "4," p. 147), made in January, 1908 (p. 149; the exhibits in the two suits were stored in Minneapolis in the warehouse of the Creamery Company (p. 542-a); and finally Cooper, an agent of the Creamery Company (according to Virtue's testimony, admitted over defendant's objection), said to Virtue, "We think we own "the creamery supply business around here" (p. 519-c). In this connection, too, the contracts providing for the prosecution of infringers are also mentioned as a circumstance. We have considered the suit -stipulations of these contracts (supra, pp. 39 et seq) where we urge that they contain only usual covenants, and were so appropriate to the relation of the parties that the clauses themselves repel any imputation of a sinister design to bring fictitious law snits.

The evidence shows only such a state of facts as would naturally arise between parties having interests in patents in the same art or other property rights invaded by the same intruders. The inquiries to be made in each of the two patent suits covered same field—the history of the improvements in butter-making by combining in one apparatus devices for churning and working butter in a continuous operation. The two corporations had had business transactions covering a series of years, and were in friendly relations with each other. They were both watchful of their rights so that their patent monopolies might not be diminished by an unlawful intrusion. An intention to bring a suit for infringement by either would be communicated to the other, and in view of the identity of the

investigation involved in the two suits, they would be likely to employ the same attorneys and attempt to save expense by using the testimony in one, so far as it was relevant without duplicating it in the other. This seems also to have been the thought of the present plaintiffs; for they became parties to the stipulation that the testimony taken in either case might "be read and used in the "other causes so far as competent and pertinent thereto" (p. 574-a), and thus procured for themselves some of the economies that arose from the concurrence of the two suits. Indeed, the very fact that the two suits were brought and prosecuted concurrently goes of itself to show the absence of any ulterior design. If any such design existed the probable course would have been to separate the two suits as widely as possible in attorneys, commencement and evidence.

We have already collected under Topic VIII, the evidence relating to the alleged threats. As we have there shown, the so-called threats were in fact justifiable warnings given in good faith immediately before or immediately after the infringement suits were brought, and were amply warranted by the circumstances.

It is apparent without further argument that the conclusion of the trial judge was not only justified by the evidence, but the only one that could be legitimately drawn from it:

"Then, outside of the contract of February 24, 1898, "and outside of the contract of April, 1897, and outside "of all the other written contracts between the parties, it "is claimed by plaintiffs that there was another contract "between the Creamery Package Manufacturing Company, "and the Owatonna Manufacturing Company, by virtue of "which they agreed to bring these suits in order to drive "the plaintiffs out of business. If there were evidence to "go to the jury that these companies were guilty of mak-"ing any such contract as that I should feel inclined to 'submit the case to the jury. But there is no evidence in "my opinion, which would warrant the jury in finding "that any agreement of that kind existed. The only result "that the jury would be justified in reaching would be "that there was an agreement to bring these two suits "together, but that is not sufficient. If the original con-"tract of February 24, 1898, had provided for the bringing "of an action against alleged infringers for the purpose "of driving them out of business, that would be a different "thing altogether, but there is nothing in that contract "which shows the contemplation of anything of that kind. "The stockholders could not have believed that such un-"lawful means would be resorted to for the purpose of "carrying the contract into effect. The stockholders had "a right to believe that the officers of the company would "confine themselves to the contract itself" (pp. 566-c. 567-a).

The same conclusion is announced by the Circuit Court of Appeals in its decision. It is there said:

"The mere fact that two infringement suits were brought upon the same day and the defendants were represented by the same counsel does not show, or even tend to show, that they were brought for any purpose other than the enforcement of the legal rights of the owners of the patents. It falls far short, it seems to us, of establishing an agreement or conspiracy between the defendants to bring these suits at the same time for the purpose of driving the plaintiffs out of business, and after a patient and thorough examination of the record we think the Circuit

"Court was fully justified in holding that there was no "evidence offered at the trial 'which would warrant the "jury in finding that any agreement of that kind existed"." (179 Fed., 119).

# 2. A COMBINATION TO BRING SUITS IS NOT WITHIN THE

The courts are always open to suitors for the protection of their rights. Indeed, one of the great achievements of civilisation is the shielding of life and property and the ending of disputes through adjudications of competent tribunals. An appeal to justice in order to give efficient relief may not be clogged by conditions nor menaced by hidden and dangerous consequences. The access to the courts is in effect taken away if there be annexed to it the fear that by some miconstruction of motives or strained inference of fact the legal enforcement of a right may result in a liability to a wrong-doer. It is for this reason that the courts have been loth to give the unsuccessful defendant a cause of action for the malicious prosecution of a civil suit unless there be an interference with person or property. The dread of such retaliatory suits tends to make the holder of a just claim rather suffer its loss than incur the risk of failure and a resulting suit by his adversary.

The enforcement of a claim by suit is entirely dissociated from commerce. It has, of course, indirect and remote relations to trade both within the state and without; but its immediate and direct relation is solely to the protection of rights guaranteed by the Constitutions. The power of Congress to regulate commerce—beneficial and necessary as it is—is subordinate to the higher right of the citizen

to the adjudication of his civil controversies by established tribunals. It may be, and often is, the case that the successful defendant suffers great loss and hardship for which no compensation is given him by the law, but that is one of the incidents of our imperfect means for administering justice and is borne (as many other losses must be borne) in return for the invaluable advantages that arise from government by law.

There are combinations and agreements and conspiracies innumerable that do not fall within the Sherman Law, because they have no direct or immediate relation to interstate commerce. The most notable example is manufacture and production of all kinds within the limits of a single state. The Knight case, dealing with manufacture dissociated from immediate transportation, states a rule persuasive in considering whether law suits can ever form the basis for a violation of the Sherman Law. Manufacture is not interstate commerce, but law suits in general and patent infringement suits particularly are even more remote from commerce than manufacture itself.

The right to submit controversies to the courts is so essential and fundamental and so far removed from interstate commerce that combinations in law suits should not be brought within its purview unless required by precise and positive language. No such language is found in the Sherman Law. The question, however, seems to us not necessarily involved in this case because no combination or act of an unlawful or forbidden character has been shown, and because for other reasons stated in this brief, the claim of the plaintiffs is not sustainable.

#### TOPIO X.

## Combinations Among Patent Owners.

The agreements in this case all relate to patents and petent rights, and the plaintiffs' claim is based wholly upon infringement suits brought or threatened by defendants (plaintiffs' brief, p. 1). The action being for the recovery only of such damages as arise from a breach of the Sherman Law, it is proper to discuss the status of combinations in patents under that law, even though our contention is that for many other reasons the judgment of the trial court and of the Court of Appeals should be affirmed.

1. The public is not entitled to competition among patent owness or licenses, and therefore combinations enlating to United States patents are not with in the Sheeman Law.

The Sherman Law operates only on restraint of trade.

There is no violation of the law unless free competition is directly and substantially restricted.

Northern Securities Co. v. United States, 198 U. S., 197, p. 331, and cases on pp. 19 et seq. of this brief.

The fundamental thing is free competition where the public is entitled to it. When the particular thing is not within the field of competition, it is not within the liberman Law, and restraints of trade in it are not punishable under that law, because they invade no right of the public. Examples of non-competitive things are contents or combinations relating to trade secrets (Board of Trade v. Obristey Grain Co., 198 U. S. 236, 252), and

those relating to personal service (State v. Duluth Board of Trade, 107 Minn. 506).

Patents are also in the non-competitive class. As a stimplus to invention and for the ultimate benefit of the public inventors are given a monopoly in their discoveries for a limited time. This favoritism is authorized by the Constitution on principles of political economy so broad and just that they have been adopted by every civilized country. The correlative benefit to the public is the inventor's disclosure of his discovery, with the right to use it freely after the expiration of the monopoly period. We use the word "monopoly" in this connection somewhat inaccurately because in a technical sense a monopoly connotes the exclusion of the public "from something which was be-"fore of common right." (Charles River Bridge v. Warren Bridge, 11 Pet. U. S. 420, p. 607). The monopoly of the United States patent is merely the exclusion of the public for a definite term from something new and uniful not theretofore known or used by it; and this new and uneful thing becomes public property, barring only the limited but exclusive term given to the inventor. The inventor takes nothing from the public, but on the contrary gives the public something that it did not have and presumably but for his talent and industry would never have had. That this description of the patent is the true one is demonstrated by the decisions of this court. We cite only a few of the cases:

Grant v. Roymond, 6 Pet. 218.

Bloomer v. McQuevan, 14 How. 589.

United States v. Bell Telephone Co., 167 U. S. 224.

Paper Bag Fatent case, 210 U. S. 405.

Henry v. Dick Company, 224 U. S. 1.

Pew inventions spring complete from the inventor's brain, so that they may be protected by a single patent. Discovery generally comes step by step, so that most patents must be butressed by subsequent inventions in order to give either the discoverer or the public the full benefit of the new and useful things whose discovery is stimulated by the Patent Laws. The Sherman Law, if extended to patents and combinations in patents, would not prevent the granting of any number of patents in the same art to the same inventor. In fact, unless prohibited by that law, an inventor can buy later inventions made by others and unite them with his own for his own advantage. This is shown by the opinion in United States v. Bell Telephone Co., 167 U. S. 224, at p. 249. It is there said by Mr. Justice Brewer:

"Much is said in the briefs and in the arguments about "the practical continuance of the telephone monopoly. "It is well to understand exactly what is meant thereby. "No one questions that the Bell patent has expired, and "that all of his invention is free to the use of the public. "It is not denied that Berliner's invention is something "independent and distinct from the Bell invention. It is "the combination of these inventions with those of Blake "and Edison which makes the instrument in commercial "use, and because this is the most serviceable it is the one "that the public insists upon having. But each invention "has independent rights. It loses nothing because when "united with another it results in an instrument more "caluable than either alone will give. Suppose that at the "expiration of this Berliner patent some new invention "shall be made by which in connection with those already "free to the public an instrument can be manufactured "far surpassing in utility that used today, and the Bell

"Company shall purchase that invention, the public, which "always insists on having the best and most serviceable. "will undoubtedly take the new instrument, and in that "way it may happen that what is called the telephone "monopoly is practice" till further continued. But "surely that does not andge the legal rights of any one. "The inventor of the latest addition is entitled to full "protection, and if the Telephone Company buys that in-"vention it is entitled to all the rights which the inventor "had. All that the patent law requires is that when a "patent expires, the invention covered by that patent shall "be free to every one, and not that the public has the right "to the use of any other invention, the patent for which "has not expired, and which adds to the utility and ad-"vantage of the instrument made as the result of the com-"bined inventions" (167 U. S. 249).

The argument which Judge Brewer rejected would have been entitled to great weight in case there existed a right in the public to competition between patents in the same art. If there were such a right the claim that there was an accumulation of patents in a single ownership would have been a meritorious one. There would have been a suppression of a competition to which the public was entitled.

The precise question arose in *Indiana Manufacturing Company v. J. I. Case do. Company*, 154 Fed. 365. The facts in that case showed that the Indiana Company owned a large number of patents relating to straw stackers, and from time to time bought up patents for improvements on such appliances until it owned "practically all the patents "that pertained to this art" (154 Fed. 370). The Case Company—one of many licensees—contended that this massing of patents in the hands of the Indiana Company,

violated the Sherman Law. Mr. Justice Baker, in overraling this contention, gives the example of the linotype and monotype inventions as machines that produce "the "same result by essentially different means and modes of "operation," and finds no reason why the inventor of the linotype was disqualified as a buyer of the monotype. In the opinion it is said: "Would he" (the supposed inventor of the lintoype) "by conferring upon the public the ad-"vantage of that disclosure be barred of the right to make "or buy the monotype invention? We do not understand "counsel for appellee to say 'yes' squarely. But their "contention comes to this: If he owned either alone, over "that he would have complete dominion; owning both, he "controls nothing. The public has no right in either in-"pention; therefore the public has the right to have them "both in the market competing for buyers. Naught plus "naught; the sum of two naughts is a substantive quan-"tity" (154 Fed, 371).

This puts the case pointedly. Each patent is a monoply involving no restraint of trade, and the same absence of trade restraint continues, no matter to what extent the ownership of the patents may vest in the same person. The increase in the number of patents under the same control does not change the nature of the grant. Although one person owns all the patents in the same art, each patent is still a monopoly from whose enjoyment the public is excluded during the patent term, and all the patents together have the same characteristic of exclusion that each one has taken separately. The public, not being entitled to competition from any of them, is not harmed if competition, once existing, is destroyed.

2. IF THE SHERMAN LAW APPLIES TO COMBINATIONS AMONG PATENT OWNERS, THE PATENTER'S POWER OF ASSIGNMENT IS LIMITED, AND TO THAT EXTENT HIS EXCLUSIVE RIGHTS ARE DESTROYED.

Even without specification in the law, the patentee's monopoly would by implication and fair construction be assignable and devisable, but the quality of assignability was too important to rest on construction alone, and is therefore put beyond cavil by two separate sections of the Patent Law (Rev. Stat., \$\$4884, 4898). In the first of these sections the contents of the patent are prescribed. The document must contain "a grant to the patentee, his "heirs and assigns, for the term of seventeen years, of the "exclusive right to make, use and vend the invention or "discovery throughout the United States." This is said by Mr. Justice McKenna in the Paper Bag Patent Case (210 U. S. 423) "to be the language of complete monop-"oly." The later section (\$4898) declares that "every "patent or interest therein shall be assignable in law, by "an instrument in writing; and the patentee or his assigns "or legal representatives may, in like manner, grant and "convey an exclusive right under his patent to the whole "or any specified part of the United States."

Universal vendibility is the most valuable characteristic of the patent. An exclusive right to an invention,—that is, the right by the inventor to use his own to the exclusion of the public—would be a weak and halting privilege if it belonged to the inventor alone and could not during his life be passed to others or did not become assets of his estate on his death. The reward of the inventor—the return for his ingenuity and toil—is not merely a personal right of exclusion of others, a merely personal monopoly,

but a monopoly for a definite number of years which he can retain either in use or non-use, sell to others, give away or dispose of in intestacy or by will.

If the Sherman Law applies, all this is changed. The patent owner may not then make any agreement in regard to his monopoly in restraint of interstate or international trade and may not make a sale of his patent or of any rights under it to any person having a patent or interest in a patent in the same art or manufacture and doing business beyond state lines. There is thus engrafted a far-reaching exception contradictory of the grant and in part destroying it. The value of the patent, as well as the sole reason for its existence, is that it restrains trade for the owner's benefit and enables him to control prices and prevent competition in commerce both within and among the states. The reward given by the patent is the right to restrain the very commerce which the Sherman Law says shall be free from restraint. In order to comply with that law the patent owner must use his putent and the monopolistic powers given by it to restrain trade within a single state. As soon as he uses them beyond state lines restraining interstate trade, he violates the law, and if he so uses it with another having a patent in the same art, both violate the law. Each alone has a mosopoly and a power to restrain trade, but they may not combine these powers and jointly restrain trade unin the transactions are kept within the boundary of a single state. The patentee no longer has a monopoly universally vendible. There is evoluded from his market every buyer who, having a similar patent, may seek a commercial fountage by combining the two patents for use in interstate or foreign trude. To this extent the Sherman Law (if applicable to patents) curtails the patent grant and

destroys the patentees' exclusive rights. What was said of a similar claim in Bement v. National Harrow Co., (186 U. S. 70, p. 92) may also be said of the point now being discussed:—"Such a construction of the Act \* \* \* was never contemplated by its framers."

3. PATENT OWNERS MAY LAWFULLY SECURE FOR THEM-SELVES, THEOUGH A COMBINATION OF THEIR PATENTS, A TRAFFIC, HOWEVER EXTENSIVE, IN UNPATENTED ARTICLES.

This proposition follows necessarily from the decision in Henry v. A. B. Dick Company, 224 U. S. 1.

The Dick Company sold a rotary mimeograph subject to a license restriction that the machine might be "used only "with the stencil paper, ink and other supplies made by the "patentee." The wrong charged against Henry was that, having knowledge of the license restriction, he sold the licensee for use on the mimeograph an ink of other make, in the expectation that it would be used in connection with that mechanism. It was held that the license restriction was within the protection of the patent laws, and that Henry was properly enjoined as being guilty of contributory infringement.

The result of the decision is that a patent owner may sell his patented article under such conditions (not in themselves illegal) as he may see fit to impose, and that these conditions may extend to the use of unpatented articles, so that the monopoly of the patent may be effectual to obtain for the patent owner trade in disconnected and unpatented articles. This appears in different parts of the opinion. For example, in commenting on the Harrow case (186 U. S. 70) the Court says in reference to the stipulations there construed:

"If the stipplation in an agreement between patentees fund dealers in patented articles, which, among other "things, fixed a price below which the patented articles "should not be sold, would be a reasonable and valid con-"dition, it must follow that any other reasonable stipula-"tion, not inherently violative of some substantive law, aimposed by a patentee as part of a sale of a patented ma-"chine, would be equally valid and enforceable." Again in speaking of the illustrations given as to the extent to which such collateral restrictions may be carried: "But "these illustrations all fall of their purpose, because the "public is always free to take or refuse the patented ar-"ticle on the terms imposed. If they be too onerous or "not in keeping with the benefits, the patented article "will not find a market. The public, by permitting the in-"pention to go unused, loses nothing which it had before, "and when the patent expires will be free to use the in-"contion without compensation or restriction. This was "pointed out in the Paper Bag case, where the inventor "would neither use himself nor allow others to use, and "yet was held entitled to restrain infringement, because "he had the exclusive right to keep all others from using "during the life of the patent. This large right embraces "the lesser of permitting others to use upon such terms "as the patentee chooses to prescribe" (224 U. S. p. 34).

This view is emphasised by what the Ohlef Justice says in the dissenting opinion: "Take a patentee selling a patented engine. He will now have the right by contract to "bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine for even the lubricants employed in its operation. Take "a patented carpenter's plane. The power now exists in "the patentee by contract to validly confine a carpenter

"purchasing one of the planes to the use of immber sayed from trees prossing on the land of a particular person for sassed by a particular mill. Take a patented cooking atensil. The power is now recognized in the patentee to bind by contract one who buys the stensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the aframe? (224 U. S. p. 55).

If the owner of a single patent may by reason of his ownership impose conditions which give him a market for unpatented articles, that right cannot be impaired by his purchase of other patents in the same art, nor ought he bepenalized for his ownership of a single patent by being excluded from acquiring another patent with the same incidental privilege. In the end he may become the owner of all the patents in the art, and may possibly obtain an exclusive market during the patent term for many nnpatented commodities. But each patent being itself a noncompetitive monopoly, the public suffers no detriment by the union of many of them in a single control. It may abide its time when by lapse of the patent period the putentses' rights have expired. Utimately it is the gainer, The patent monopoly with all its incidental privileges is the price that is paid for "new and useful" things, which without this stimulus might never be found or if found might never be disclosed. This phase is accentuated in the Dick case, where it is said:

"It must not be forgotten that we are dealing with a "constitutional and statutory monopoly. An attack upon

"the rights under a patent because it secures a monopoly to make, to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the "Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely falled to impose limitations upon the inventor's extensive right of use. And if it be that the ingenuity of patentoes in devising ways in which to reap the benefit "of their discoveries requires to be restrained, Congress "alone has the power to determine what restraints shall be "imposed" (224 U. S. p. 35).

What the patent gives to the inventor, his heirs and amigns, is a right "to make, use and vend" the patented thing, and this right is exclusive, vendible, assignable and condible. All these qualities inhere in the grant and pass both to the patentee and his representatives and assigns. The right to make, use and vend a thing must be construed as broadly as may be in order that the thing granted may rather live than perish. So construed, it must mean the making and using and vending in every way, to the end that the patentee will, during the term of his monopoly, receive the highest commercial advantage from his invention. It is an unlimited right, without qualification and without exception. It carries with it whatever incidental advantages may arise from such unlimited right. One of the advantages is that the patented thing may draw to itself trade in things unpatented, and may by the use of commercial skill on the part of the owner bring to him profitable transactions in other mmodities. Mcreover, having absolute dominion, he may refuse to sell either his patent or his patented device except on the condition that the purchaser shall buy from him unpatented commodities at prices higher than the

market, or sell to him such commodities at prices lower than the market. He may do this if he owns but one patent, and he may do the like if he purchases other patents. It is of no moment that the effect is directly to restrain interstate and foreign commerce. The Sherman Law is not violated, because it does not apply. The market for unpatented articles is an incident of each patent monopoly, and continues to be an incident of each even though all the patents in the same art are united in a single ownership. This is the only conclusion justified by the decision in Henry v. Dick Company, and the only one that will give full effect to the Acts of Congress relating to patents.

#### TOPIC XI.

### The Assignments of Error.

Plaintiffs assign 28 errors. Of these assignments, those numbered 4, 5, 10, 11, 12, 13, and 15 to 20, are founded on alleged errors occurring at the trial, to which no exception was taken. Such assignments are unavailing. (Pomeroy's Lessee v. Bank of Indiana, 1 Wall., 592; United States v. Carry, 110 U. S. 51; Pacific Bapress Co. a Malin, 132 U. S. 531; Newport News &c. Co. v. Pace, 158 U. S. 36). The state law (B. L. Minn. 1905, §4200) dispensing with exceptions and permitting the litigant to specify errors on a motion for a new trial does not control or affect proceedings in the Federal Courts. (Nucli m. Burrows, 91 U. S. 426-State statute requiring written instructions; Indianapolic de. R. R. Co. p. Horst, 93 U. S. 201-A like State statute; Lincoln v. Power, 151 U. S. 436—State statute requiring all instructions of the Court to the just to be in writing; St. Clair v. United States, 154 U. S. 134—State statute dispensing with exceptions when the charge is in writing; Ghost v. United States, 168 Fed. 841—State statute dispensing with exceptions).

Nor is there any assignment bringing for review the principal ruling at the trial,—that by which plaintiffs' offer of evidence as to their damages was excluded. The first three errors refer to this subject, Error "1" being, however, based on the others and being futile without them. The offer (Errors "2" and "3") was to prove "that "the interstate commerce and trade of the two plaintiffs " was taken away, destroyed and damaged by the "prosecution of these two suits " \* and that the plain-"tiffs have thereby suffered the damages claimed by them "In the complaint" (p. 557). There was here no proposal to prove a definite fact, but merely an "omnibus" tender of evidence that by the prosecution of the two suits plaintiffs "sustained the damages claimed" in a lengthy complaint. Such an offer is insufficient. (Alexander v. Thompson, 42 Minn. 498; King v. City of Duluth, 81 Minn. 182; 38 Oyc. 1333-4). But apart from this there was no exception taken to the ruling by which the offer was excluded (pp. 564, 567). The only exception which plaintiffs claim is in this sentence: "We desire to except to "the ruling of the Court in sustaining the objection of the "defendants to the evidence offered by the plaintiffs" (p. 568-a). The reference here may be to any one of three rulings of the kind mentioned, one on page 325, another on page 538 and a third on pages 564 and 567. "Exceptions. "to be of any avail, must present distinctly and specifically "the ruling objected to" (Springfield &c. Insurance Co. v. Sea, 21 Wall. 158.).

Error "6" rests on a mere suggestion to the Court as to the rumors and other like acts (p. 569-a). No offer of proof of damage from this source was made.

Errors "7", "8" and "9" deal with a contract (Exhibit "C", p. 101) between Virtue and one Deeg and the Creamery Package Manufacturing Company and the Cornish, Curtis & Greene Manufacturing Company. This contract was the subject of litigation between the parties in the District Court of Steele county, Minnesota. The proceedings in that action are set out in the defendants' third defense (pp. 156-160). The action was tried in that court, and on the trial was dismissed as to the Owatonna Manufacturing Company. It resulted in June, 1908, in a verdict for \$10,000 against the Creamery Company, which was set aside in September, 1908 (p. 160-c). The action was still pending and undetermined in the Steele County Court at the time this suit was tried. The plaintiffs' offer (pp. 243, 244) is accompanied by a statement that they sought "to recover no damage by reason of that contract" (p. 245-a).

The offer at best was merely cumulative of other evidence received as tending to show a "step" in an alleged conspiracy (p. 243-a); but aside from this it was an attempt to litigate in this case the very things that were already in litigation between the same parties in another court in a suit still pending and undetermined. It would produce immeasurable confusion and unending re-trials if a party to a suit could litigate as a "step" in an alleged conspiracy an independent cause of action then in suit in another court between himself and the same adversary.

Error 14 is based on a question seeking from the witness Darby, a newspaper reporter, a conversation (p. 493) with T. J. Howe, an officer of the Owatonna Manufacturing Company. The witness testified that four lines in a paragraph of an article written by him for "The Peoples' Press" contained the substance of what Howe told him. The four lines were then offered and excluded (p. 493-c); but these lines do not appear in the record and no error is assigned to their exclusion. Then the witness was asked to state what Mr. Howe told him "upon that occasion." The objection to the question was sustained. The publication not being in evidence, there is no clue to what was expected to be adduced by the question, and an inference that the answer might be favorable to the plaintiffs is precluded. It was the plaintiffs' fluty to make a proper offer. This may be omitted only in instances where the question "clearly admits of "an answer relevant to the issues and favorable to the "party on whose side the witenss is called". (Buckstoff v. Russell, 151 U. S. 626, p. 637). Moreover the question could elicit nothing either favorable or adverse to the plaintiffs except "a mere narrative of a past occurrence" by an officer of a corporation, and such narrative by the agent is not admissible against his principal. ( Northwestern Union Packet Co. v. Clough, 20 Wall. 528; Ggetz v. Bank, 119 U. S. 551, p. 569; La Abra &c. Co. v. United States, 175 U. S. 423, p. 449).

Error "21" rests on the granting of a motion to strike out some evidence admitted only against the Owatonna Manufacturing Company (p. 436). There was an exception taken to the ruling which struck out the evidence on that Company's motion; but the ruling by which the evidence was excluded in the first instance as respects this defendant was not excepted to (p. 435). Errors "22", "23" and "24" related to excluded offers of proof that the plaintiffs did not infringe any letters patent ewned by either of the defendant corporations. They did infringe the patents of the Creamery Company, as was adjudicated against them in the Creamery Company's patent suit, even though the adjudication was by an interlocutory decree. As to the non-infringement of the patent of the Owatonna Manufacturing Company, that matter was entirely immaterial in view of the decree in its suit. The important point was whether or not plaintiffs had used the device covered by that patent, and the offer did not include a proposal to prove a non-user by the plaintiffs.

On pages 93-95 we have considered errors "25" and "26", relating to offers of proof as to the prior invention of the mechanism in the Owatonna Manufacturing Company's patent.

Error "27" goes to the refusal of the trial court to grant a new trial. No error is assignable for such refusal (Pomeroy's Lessee v. Bank, 1 Wall. 592); and the same may be said of error "28" (p. 617), which asserts error "in affirming the judgment" (Tessas v. Archibaid, 170 U. S. 665).

From this examination of the assignments it appears that most of them are without basis in proper exceptions, and that those having proper exceptions in their support are without merit.

#### CONCLUSION.

In spite of the voluminous record and the lengthy arguments, the plaintiffs have not been able to overcome the obstacle that confronts them at the threshold of the case. Lured by the hope of greatly enhanced damages, they have attempted to bring themselves within the Sherman Law, but have wholly failed to show that they belong to the class for whose protection that law was designed and to whom alone it gives a right of recovery. There is no causal connection between "anything forbidden or declared unlawful" by the statute and the acts of which they complain. This does not mean that if they have in fact suffered an injury they have no remedy; it means only that they have no statutory grounds for three-fold compensation.

We submit that the judgment should be affirmed.

EMANUEL COHEN,
JOHN B. ATWATER,
FRANK W. SHAW,
GROUGE C. FRY,

For the Oreamery Package Manufacturing Company, one of the Defendants in Error.

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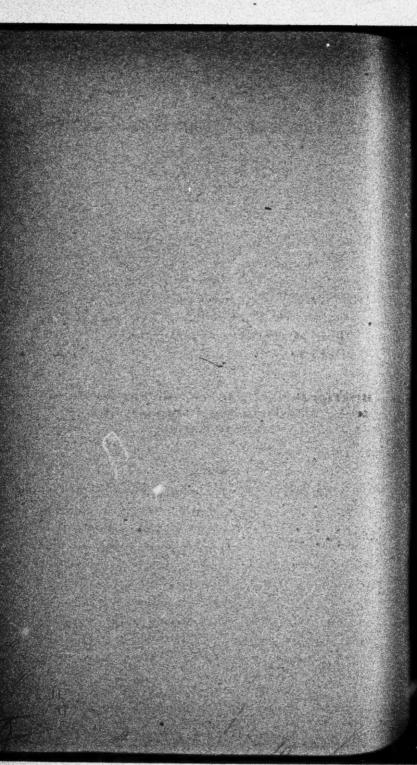
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## Supreme Court of the United States.

OCTOBER TERM, 1912.

#### No. 80.

D. E. VIRTUE AND THE OWATONNA FANNING MILL COMPANY, PLAINTIFFS IN ERROR,

88.

THE CREAMERY PACKAGE MANUFACTURING COMPANY, THE OWATONNA MANUFACTURING COMPANY AND FRANK LABARE, DEFENDANTS IN ERROR.

Brief for Defendants in Error, The Owatonna Manufacturing Company and Frank LaBare.

#### Statement.

The brief filed in this case by counsel for the Creamery Package Manufacturing Company, the other defendant in error, contains such a complete statement of the facts and such a full presentation of the law of the case, that it is believed to be unnecessary on behalf of these defendants in error to do more than to call the attention of the court to the entire lack of evidence connecting the Owatonna Manufacturing Company or its president, Frank LaBare, with any matters declared to be illegal by the Sherman Anti-Trust Act, under section 7 of

which this action is brought. We therefore ask the court to consider, in connection with the case of these two defendants in error, those portions of Mr. Cohen's brief for the Creamery Package Manufacturing Company, found under Topics I, II, VII, VIII, IX, X, and XI, and his "Statement of the Case."

[We shall for convenience refer to the corporation plaintiff in error, as the "Fanning Mill Company" and to the other defendant in error as the "Creamery Company."]

On January 17, 1893, letters patent of the United States No. 490,105 were issued to Reuben B. Disbrow and Darius W. Payne for improvements in Combined Churns and Butterworkers. On the 2nd day of October, 1893. Disbrow and Payne granted and assigned to the defendant in error, Owatonna Manufacturing Company, "the exclusive right to manufacture and sell throughout the United States and the Territories thereof, the Disbrow Combined Churn and Butterworker under said patent No. 490,105, and all subsequent patents for improvements that may be made to it" (Rec., p. 90). After the Owatonna Manufacturing Company acquired the exclusive right to manufacture and sell the Disbrow machine, litigation over the patent arose between itself and F. B. Fargo & Company of Lake Mills, Wisconsin. This litigation was of two kinds: an interference suit in the United States Patent Office instituted by F. B. Fargo & Company to set aside the Disbrow patent (Rec., p. 396), and a suit in the United States Circuit Court for the District of Minnesota, in which the Owatonna Manufacturing Company was complement and F. B. Fargo & Company

defendant (94 Fed. Rep., p. 519), and in which a preliminary injunction was granted by the Circuit Court upon the commencement of the suit (Rec., p. 222).

In 1896 Reuben B. Disbrow and Darius W. Payne, patentees of the Disbrow machine, and grantors to the Owatonna Manufacturing Company of the exclusive right to manufacture that machine, organized a corporation called the Disbrow Manufacturing Company, which began the manufacture and sale of a combined churn and butterworker under a subsequent patent issued to Disbrow, which machine was put on the market under the name of the "New Disbrow" or the "Winner" (Rec., p. 398 and p. 407). The Disbrow Manufacturing Company, in the fall of 1896, entered into a contract with the Creamery Package Manufacturing Company under which said last named company was given the sale of this later machine—the so-called "Winner" or "New Disbrow."

The Owatonna Manufacturing Company considered that this later Disbrow machine was an infringement of the earlier Disbrow patent controlled by it, and that the later Disbrow patents under which the new machine was being manufactured, belonged to it, under the clause of the contract of October 2, 1893, by which it acquired the original Disbrow patent "and all subsequent patents for improvements that may be made to it" (Rec., pp. 397-399 and p. 403). It took the position that the Disbrow Manufacturing Company had no right to manufacture this machine, and that the Creamery Company had no right to sell it (Rec., p. 403). Having obtained a preliminary injunction in the United States

Circuit Court against F. B. Fargo & Company for infringing its Diebrow patent No. 490,105, the Owatonna Manufacturing Company, on April 15, 1897, began suit in the United States Circuit Court for the District of Minnesota, Second Division, against the Disbrow Manufacturing Company for infringement of its rights under the contract of October 2, 1893 (Rec., pp. 419-420). Reuben B. Disbrow, and his associates, also brought suit in the District Court of Blue Earth County, Minnesots, against the Owatonna Manufacturing Company to have the contract of October 2, 1893, set aside (Rec., p. 419). All of this litigation—the Fargo suits, the two suits between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company, and a suit brought by the Owatonna Manuiccturing Company against a creamery at Cooleyville which was using a combined churn and butterworker manufactured by the Disbrow Manufacturing Company (Rec., p. 416)was pending a April, 1897.

On or about the 19th of April, 1897, representatives of the three companies, the Owatonna Manufacturing Company, the Disbrow Manufacturing Company and the Creamery Company, got together at Mankato, and negotiated a settlement of the litigation then pending between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company. The contracts then executed are all in the record and are designated Exhibits B1, B9, B10, and B11.

The contract between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company (Exhibit B9, Rec., pp. 89-96), recited the prior contract of October 2, 1893; the fact that certain differences had arisen between the parties as to whether the Owatonna Manufacturing Company was entitled under said contract to the exclusive right to manufacture and sell combined churns and butterworkers under the later patents obtained by the Disbrows and Payne, and as to whether the Owatonna Company had fulfilled all of the terms of that contract; the fact that the Disbrow Manufacturing Company and the Disbrows and Payne were engaged in the manufacture and sale of a combined churn and butterworker which they designated as the "Winner" or "New Disbrow;" the fact that growing out of these differences certain litigation had been instituted between the parties, and that all parties to the contract were desirous of settling all differences between them and stopping the pending litigation. The contract also provided for an assignment to the Owatonna Manufacturing Company of all of the natents ramed in the contract "granted or to be granted" and the payment of a royalty by the Owatonna Manufacturing Company "on all combined churns and butterworkers manufactured and sold by it during the life of this contract, whether said machines contain any of said patents or not." The contract also gave to the Owatonna Manufacturing Company the exclusive right to use the names "Disbrow" and "Winner" as trademarks or tradenames of churns or butterworkers, and provided that the other parties to the contract should not engage in manufacturing or selling churns or butterworkers "during the life of said patents or this contract," The contract further specified the royalties that were to

he paid upon each combined churn and butterworker anufactured under the contract, and, reciting that by an arrangement of even date therewith the Creamery Company was to become the exclusive purchaser of mid machines, provided that it should deduct the amount of the revalties from the purchase price of the machines and pay them directly over to the Disbrow Manufacturing Company. The contract further provided for a dismissal of "all suits now pending between said parties, including a suit brought by said party of the second part (Owatonna Manufacturing Company) against the Berlin & Summit Creamery Association." Exhibit B 10 (Rec., pp. 97-99) is the assignment of the patents provided for in the contract Exhibit B9, and was executed upon the same date by the Disbrow Manufacturing Company, Reuben B. Disbrow, Darius W. Payne, Levi A. Disbrow and Horatio N. Seeley.

On the same day that these contracts were entered into between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company and its associates, the contract Exhibit B1 (Rec., pp. 69-74) was entered into between the Owatonna Manufacturing Company and the Creamery Company. This contract recited the fact that the Owatonna Manufacturing Company was the owner of certain patents covering combined churns and butterworkers and was engaged in manufacturing such machines, and that the Creamery Company was "desirous to handle the said combined churns and butterworkers as sole sales agent." Under this contract the Creamery Company was given the entire control of the sale of said combined churns and

butterworkers for which it agreed to pay a sum equal to fifty per cent of the list prices of said machines. It was further provided that the contract should continue "during the life of the patents on combined churns and butterworkers now owned and controlled by the party of the first part (Owatonna Manufacturing Company) and those which it may hereafter acquire." The Owatonna Manufacturing Company also agrees "to protect the party of the second part (The Creamery Company) from all suits for infringement of patents arising out of the sale of said churns," also to defend the validity of its patents and to prosecute infringers thereof. Exhibits B2 and B3 (Rec., pp. 75-76) are agreements modifying and supplementing the contract Exhibit B1 in particulars immaterial to the present litigation.

On the 4th day of June, 1898, another contract was entered into between the Owatoma Manufacturing Company and the Creamery Company (Exhibit B4. Rec., pp. 77-82). This contract recited the former contract of April 19, 1897, between the same parties; that certain litigation had been pending in the United States Circuit Court for the District of Minnesota between the Owatonna Manufacturing Company and F. B. Fargo & Company concerning certain of the puents named in the contract of April 19, 1897; that Pargo & Company were engaged in the manufacture and sale of a combined churn and butterworker known as the Victor, which it was agreed did not infringe any of said patents; that the Creamery Company had acquired the business of Fargo & Company of many facturing and selling churns and butterworkers, and the

it proposed to continue the same and to manufacture and sell other nombined churns and butterworkers which relate he developed and which did not infringe the patents of the Owatonna Manufacturing Company; that the Cresmery Company claimed that machines manufactured and sold by the Owatonna Manufacturing Company infringed certain letters patent owned by it; and that "the parties hereto are desirons of settling all claims for profits, damages or costs that have accrued to said party of the first part (Owatonna Manufacturing Company) through the manufacture, sale and use of any infringing combined churns and butterworkers made by said F. B. Pargo & Company, and through the litigation above referred to, and also of settling and adjusting any claims that may have accrued to said party of the second part (The Creamery Company) through the infringement or alleged infringement of any natent owned or controlled by said F. B. Fargo & Company, or said party of the second part, in the manufacture and sale of any combined churn and butterworker heretofore made or sold by said party of the first part; and are also desirous of making a general adjustment between the parties hereto of differences that have existen by reason of said sales contract and the acquiring by said party of the second part of the churn and butterworker business of said F. B. Fargo & Company." This contract contained a number of provisions which may be briefly stated as follows:

(1) That the Fargo suit in the United States Circuit Court in which the proofs had been taken and the testimony printed should be brought to "a speedy hearing and determination upon the proofs and exhibits in the case (this being the cuit in which an injunction had been issued by the court in the preceding April, enjoining Farge & Company from infringing the Dishraw patent), that all other panding suits should be dismissed; that no further suits should be brought by either party against the other or its customers, or by the Owatomes Manufacturing Company seasons. Fargo & Company or its customers on account of the manufacture and sale of any combined churn and butterworker prior to the date of this agreement.

(2) That the Creamery Company would not manufacture the "Winner" machine or the "Disbrow" or self any of such machines other than those manufactured by "the Owatonna Manufacturing Company, but that the Creamery Company was at liberty to manufacture and self combined churns and butterworkers of any other construction.

(3) That the Creamery Company should pay to the Owatonna Manufacturing Company Seven Thousand Dollars (\$7,000.00) in satisfaction of damages, royalties and costs by reason of the manufacture and sale of churns and butterworkers by the Creamery Company and Pargo & Company.

(4) That the contract of April 19, 1897, should remain in force and that if the Creamery Company did not purchase 55 per cent of the total amount of its sales of combined churns and butterworkers from the Owatonna Manufacturing Company in any year, then it should pay an additional amount to the Owatonna Manufacturing Company; and that in selling combined churns and butterworkers the Creamery Company

would not discriminate against those manufactured by the Owatonna Manufacturing Company and in favor of those manufactured by itself.

(5) That the Owatonna Manufacturing Company would protect its patents upon combined churns and butterworkers by prosecuting infringers thereof at its own expense, in which the other party should give assistance, without expense to itself, and that the Creamery Company should not lend its assistance to infringers in defending against the patents owned by the Owatonna Manufacturing Company.

(6) Licensing the Owatonna Manufacturing Company in its manufacture of the "Disbrow" and "Winner" machines under any patents

owned by the Creamery Company.

(7) That the Creamery Company should furnish the Owatonna Manufacturing Company with statements of its sales of combined churns and butterworkers.

The other contracts between the Owatonna Manufacturing Company and the Creamery Company which appear in the record as Exhibits B5, B6, B7 and B8 (Rec., pp. 84-89) are supplemental to the contract Exhibit B4, the contract Exhibit B5, also dated June 4, 1898, providing for the settlement of any claims of infringement by the Owatonna Manufacturing Company against A. H. Barber & Company, and Cornish Curtis & Greene Manufacturing Company, in the manufacture and sale of combined churns and butterworkers. In the contract Exhibit B8 a change was made in the list price of some of the sizes of combined churns and

butterworkers manufactured by the Owatonna Manu-

On February 24, 1898, the Creamery Company entered into a contract with F. B. Fargo & Company and certain other parties, a copy of which contract is attached to the complaint in this action as Exhibit A (Rec., pp. 41-58). Neither the Owatonna Manufacturing Company nor the defendant in error, Frank LaBare, were parties to this agreement, or had any knowledge of it, and it is unnecessary to refer to it in detail in this brief.

At some time prior to June, 1904, the plaintiffs in error D. E. Virtue and The Fanning Mill Company began the manufacture, at Owatonna, Minnesota, of a combined churn and butterworker which they designated the "Owatonna Combined Churn and Butterworker." In July, 1904, the Owatonna Manufacturing Company filed its bill of complaint in the United States Circuit Court for the District of Minnesota, First Division, against said plaintiffs in error, alleging infringement of letters patent of the United States No. 585100 dated June 22, 1897, and issued to T. J. Howe, D. J. Ames and Henry N. LaBare (Rec., pp. 103-109). Answer was filed by the defendants (Rec., pp. 110-122), the proofs were taken in the usual way, and the case, having been transferred to the Fourth Division, came on for hearing at Minneapolis before Judge Charles F. Amidon, and a decree was entered dismissing the bill of complaint, the finding of the court being, that the patent in suit "is void, for lack of invention, in view of the prior art, as to all the claims thereof counted on by the complainant in this cause" (Rec., p. 124).

In November, 1907, the plaintiffs in error began an action in the District Court for the Fifth Judicial District of the State of Minnesota against the Creamery Company, and the defendant in error herein. Owatonna Manufacturing Company, alleging that the suit above referred to, conducted against them by the Owatonna Manufacturing Company for infringement of said letters patent No. 585100, had been malicious and without probable cause, and demanding judgment against the Creamery Company and the Owatonna Manufacturing Company in the sum of \$101,000.00. A copy of the complaint in said action appears in the record at page 164. In this action issue was joined and the case was tried in the District Court for Steele County on December 9, 10, and 11, 1907, before the Honorable Thomas S. Buckham, the judge of said court, with a jury, and after the introduction of their evidence, plaintiffs rested in said action and the court granted a motion made by each of the defendants in said action, to-wit: the Creamery Company and the Owatonna Manufacturing Company, to dismiss said action on the ground that there was not sufficient evidence of want of probable cause for the prosecution of the said suit in equity in United States Circuit Court by the Owatonna Manufacturing Company for the infringement of said letters patent No. 585100. No appeal was taken by said Virtue or the Fanning Mill Company from the judgment in said malicious prosecution suit, and the same stands unaled and unreversed, and neither of the plaintiffs in said action has at this time any right of appeal from said judgment (Rec., pp. 155-156).

At the same time that the intringement suit was brought by the Owatonna Manufacturing Company against the plaintiffs in error, another suit was instituted, in the same court, by the Creamery Company against said plaintiffs in error for infringement of three letters patent on combined churns and butter, workers which the Creamery Company had purchased from F. B. Fargo & Company. The attorney who conducted the suit for the Owatonna Manufacturing Company was employed by the Creamery Company to conduct its infringement suit against said plaintiffs in error, and a stipulation was entered into between counsel that all testimony taken in either of the infringement suits might be read and used in the other suit, so far as competent and pertinent thereto, with the same force and effect as if taken directly therein (Rec., p. 574). This suit was also tried before Judge Amidon in January, 1907, and resulted in a decree for the complainant, holding all three of the patents in suit to be valid, and that the defendants therein (plaintiffs in error herein) had infringed all of said patents. An injunction was issued restraining further infringement and the cause was referred to a Master in Chancery to take an accounting. A copy of this decree appears in the record at page 162.

At the trial of the present suit in the Circuit Court a motion was made by counsel for defendants, at the close of the opening statement of the case by counsel for plaintiffs, to have the case dismissed as to the defendant Frank LaBare. This motion was denied by the court. Later after the plaintiffs had put in all of their testimony, except that relating to the question of damages, the following appears in the record:

The Court: . . . As to the defendant LaBare, I do not see any evidence at all against him and I shall be compelled to order a verdict in his favor.

Mr. Williamson: This was simply an interlocutory order.

The Court: Yes, I so understand it.

Mr. Leach: If Mr. Sperry would make a motion to dismiss as to Mr. LaBare we would not object to it.

The Court: I do not know that Mr. LaBare wishes to have his case dismissed. I denied the motion at one time during the trial of this case.

Mr. Leach: I will make a motion that the case be dropped and diamissed, as far as Frank LaBare is concerned.

The Court: I will deny the motion.

Mr. Leach: We desire to proceed with the case as against the defendants The Owatonna Manufacturing Company and the Creamery Package Manufacturing Company.

Mr. Cohen: We object to the dismissal of the case as to Frank LaBare at this stage of

the trial.

The Court: I will deny the motion to dismiss as to Frank LaBare.

Counsel for complainant excepts to the ruling of the court denying the dismissal of the case as against the defendant Frank LaBare (Rec., pp. 567-568).

In sustaining the objection to certain evidence

offered by plaintiffs, which offer was stated by plaintiffs' attorneys as follows:

"Mr. Leach: We offer to prove that the interretate commerce and trade of these two plaintiffs, Mr. Virtue and the Owatonna Fanning Mill Co. were taken away and destroyed and damaged by the prosecution of these two suits, one brought by the Owatonna Manufacturing Company and one brought by the Creamery Package Company."

## the court below said:

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Asset .

"As far as the Owatonna Manufacturing Company is concerned as I have stated, they were not parties to the contract of February 24. 1898, and not responsible for anything done by the Creamery Package Manufacturing Company, one of the defendants here in carrying out the terms of that contract. The contract made in April, 1897, between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, was not a contract in restraint of trade, nor was it an attempt to create a monopoly. It was merely a contract making the Creamery Package Manufacturing Company the sales agent of the Owatonna Manufacturing Company, and I do not think it violates the Act. Nor do I see anything in the subsequent contract made between the Disbrows and the Owatonna Manufacturing Company, or between the Disbrows and Creamery Package Manufacturing Company which violates the terms of the Act. It is very evident, not only from the contracts themselves, but from the oral and other evidence presented. that the Disbrow contract was made solely and for no other purpose than to settle the litigation which existed between the Disbrows and the Owatonna Manufacturing Company. At any rate, there is no evidence which would justify a jury in finding that the Owatonna Manufacturing Company entered into a combination or contract that was in violation of either Section One or Section Two of the Act. So that the Creamery Package Manufacturing Company can not be held responsible for the failure of the Owatonna Manufacturing Company to maintain its action, and it can not be held responsible although it may have entered into an unlawful conspiracy with other persons for it has not entered into any such conspiracy with the Owatonna Manufacturing Company.

"Then outside of the contract of February 24, 1898, and outside of the contract of 1897, and outside of all the other written contracts between the parties, it is claimed by plaintiffs that there was another contract between the Creamery Package Manufacturing Company and the Owatonna Manufacturing Company, by virtue of which they agreed to bring these suits in order to drive the plaintiffs out of business. If there were evidence to go to the jury that these companies were guilty of making any such contract as that I should feel inclined to submit the case to the jury. But there is no evidence, in my opinion, which would warrant the jury in finding that any agreement of that kind existed. The only result that the jury would be justified in reaching would be that there was an agreement to bring these two suits together. If the original contract of February 24, 1898, had provided for the bringing of an

action against alleged infringers for the purpose of driving them out of business, that would be a different thing altogether, but there is nothing in that contract which shows the contemplation of anything of that kind. The stockholders could not have believed that such unlawful means would be resorted to for the purpose of carrying the contract into effect. The stockholders had a right to believe that the officers of the company would confine themselves to the contract itself" (Rec., pp. 566-567).

At the close of plaintiffs' evidence the court granted the motion of defendants that a verdict be directed in favor of the defendants and each of them, this direction of a verdict being stated by the court to the jury in the following terms:

"Gentlemen of the jury: In the view of the law which the court takes of this case, no cause of action has been made out by the plaintiffs that would entitle them to recover anything in this case, and I therefore direct you to return a verdict in favor of the defendants."

Judgment having been entered for defendants persuant to the directed verdict, plaintiffs brought the case by writ of error before the Circuit Court of Appeals for the Eighth Circuit where it was heard before Circuit Judges Sanborn and Adams and District Judge Riner, and the judgment of the lower court was affirmed. The opinion of the Circuit Court of Appeals delivered by Judge Riner is found in 179 Federal Reporter, page 115.

The plaintiffs in error have assigned twenty-seven errors in the trial of the case. The greater number

relate to the exclusion of evidence offered by plaintiffs during the course of the trial. In nearly every once no exception was taken by the plaintiffs to the ruling of the court, and, as we understand the rule in the Federal Courts, all advantage of exception is lost in the appellate court, unless an exception to the ruling of the trial court is noted at the time the ruling is made.

#### ARGUMENT.

As we understand the position of plaintiffs in error, so far as the case against the Owstonna Manufacturing Company, and its president Frank LaBare, is concerned, it may be stated as follows:

- (1) It is claimed that the contract between the Ows onns Manufacturing Company and the Disbrow Manufacturing Company of April 19, 1897, did away with the competition of the Disbrows, in combined churns and butterworkers, and hence was illegal under the Sherman Anti-Trust Act.
- (2) It is also claimed that the contract of the same date with the Creamery Company was in restraint of trade and illegal.
- (3) It is also claimed that the provision, in the last named contract, that the Owatonna Manufacturing Company should prosecute infringers of its patents, was also in restraint of trade, and was therefore illegal.
- (4) It is also claimed that the contract of June, 1898, between the Owatonna Manufacturing Company and the Creamery Company was also illegal under the Sherman Act.

(5) It is also claimed that the suit for infringement of patent, brought by the Owatoma Manufacturing Company against the plaintiffs in error, was entirely without merit, and was brought as a result of a conspiracy with the Creamery Company to drive the plaintiffs in error out of business.

We shall consider these points of defendants' argument in order. We desire first, however, to call attention to the fact that in the complaint the most reckless allegations were made to the effect that the Owatonna Manufacturing Company was a party to, or assisted in the bringing about of the contract of February 24, 1898 (Rec., pp. 31-37). No evidence whatever was offered at the trial connecting the Owatonna Manufacturing Company or its president, Frank LaBare, with negotiations for or the execution of said contract. On the contrary, plaintiffs' own witnesses testified that the Owatonna Manufacturing Company did not even know that any such contract was being negotiated (Rec., p. 219). We may therefore leave out of the discussion, so far as these two defendants in error are concerned, all reference to the Creamery Company contract of February 24, 1898. There being no evidence whatever connecting these defendants in error, ir any way, with said contract of February 24, 1898, or with anything that was done by the Creamery Company in carrying out that contract, it certainly can not be seriously contended that these defendants in error are in any way responsible for it, even should said contract be considered a violation, in any particular, of the Sherman Act.

#### The Disbrow Contract of 1897.

We have called attention to the fact that the Owatonna Manufacturing Company acquired the exclusive right to manufacture the Disbrow machine under the Disbrow patent No. 490,105 by means of its contract with Disbrow and Payne of October 2, 1893, and that thereafter it became involved in litigation with Fargo & Company over this patent. Disbrow and Payne had contracted to give the Owatonna Manufacturing Company all subsequent patents for improvements which might be made to the original patent. Instead of doing this Disbrow and Payne obtained subsequent patents for such improvements, and, in the fall of 1896, they organised a new corporation, known as the Disbrow Manufacturing Company, and began the manufacture and sale of a machine under such subsequent patents. This machine they designated the "New Disbrow" or the "Winner" and they placed the sale of the machine in the hands of the Creamery Company. In the spring of 1897, after obtaining an injunction against Fargo & Company, the Owatonna Manufacturing Company turned its attention to the infringement of its rights by the Disbrows. It brought two suits, one directly against the Disbrow Manufacturing Company and the Disbrows, and one against a creamery that was using one of the new machines. Obviously if the Owatonna Manufacturing Company was successful in its suits, the Creamery Company, which was selling the "New Diabrow" machine, would itself be responsible for infringement. The success of the Owatonna Manufacturing Company in obtaining a preliminary injunction

against Fargo & Company from the United States Circuit Court, foreshadowed a similar result in the litigation against the Disbrows, and brought the president of the Creamery Company to Owatonna in an effort to bring about a settlement of the litigation and differences between the Owatonna Manufacturing Company and the Disbrows (Rec., p. 400). At that time the relations between the Owatonna Manufacturing Company and the Disbrows and their associates, were so strained that it was necessary, in the two days negotiations carried or at Mankato in April, 1897, for the different interests to have separate meeting places, and for the president of the Creamery Company to carry the propositions back and forth from one meeting place to the other (Rec., p. 404 and pp. 442-443). The negotiations carried on at Mankato at that time resulted in the contracts of April, 1897.

# This Contract with the Disbrows was to Eliminate Piracy, not Competition.

It is urged by counsel for plaintiffs in error that the contract of April 19, 1897, between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company and its stockholders the Disbrows and Payne, was for the purpose of eliminating competition, and hence that this contract was in itself illegal under the Sherman Act. We submit, however, that this is an erroneous view of this contract. It was not negotiated or entered into for the purpose of eliminating competition, but for the purpose of stopping an unblushing piracy by Disbrow and Payne of a patent which they

had previously assigned to the Owatonna Manuf Company, and the validity of which they, as a were estopped from assailing. Mr. D. J. Ames, who we president of the Owatonna Manufacturing Comat the time when this contract was executed, but who appears in this case as a willing witness for the plaintiffs in error, testified that he considered, at that time, that the business that the Disbrow Manufacturing Company was doing in manufacturing the "Winner" churn was in violation of the rights of the Owatonna Manufacturing Company; and that such business in reality belonged to the Owatonna Manufacturing Company (Rec., pp. 402-403). The competition that was then being put up by the Disbrow Manufacturing Company, and the Disbrows and Payne, was not legitimate competition. It was mere piracy. It was certainly proper for the Owatonna Manufacturing Company to do away with this piracy by contract, instead of waiting for the decree of the court, in the suit which it had begun for the same purpose, and which would necessarily have involved considerable delay and a large amount of expense. It is not right therefore to say that this contract was negotiated and entered into for the purpose of stopping competition but rather that it was negotiated for the purpose of stopping the patentees, from whom the Owatonna Manufacturing Company had acquired its original rights, from pirating the invention which they had already by the contract of October 2, 1893, granted the Owatonna Manufacturing Company.

The provision in this contract that the Disbrows should not engage in manufacturing or selling combined churns depends on the Owatonna Manufacturing Company, and under which they were to receive a royalty, was not in violation of the Sherman Anti-Trust Act. It was not an agreement in restraint of interestate commerce, and could not affect such commerce, except in a very remote and incidental manner. It may be noted in this connection that neither of the Disbrows over paid any attention to this clause of the agreement. Both of them were called as witnesses in this case (Rea., p. 406 and p. 425). Both testified that they have for several years been engaged in the manufacture of combined churns and butterworkers in connection with the Perfection Churn Company, which is designated, by counsel for plaintiffs in error, as a competing company.

#### The Creamery Contract of April, 1897.

At the same time that the April, 1897, contract was executed between the Owatonna Manufacturing Company and the Disbrows, the contract was also entered into between the Owatonna Manufacturing Company and the Creamery Company which is generally designated as the "sales contract." We have pointed out the principal features of this contract. It merely gave the Creamery Company the exclusive selling agency of the patented machine manufactured by the Owatonna Manufacturing Company, during the life of its patents upon combined churns and butterworkers. It was not a contract that was in restraint of trade in any particular. On the contrary it tended to promote and increase such trade. It placed the selling agency of the machines

made by the Owatonna Manufacturing Company in the hands of the Creamery Company, which had the capital and facilities for handling such trade and promoting and increasing the sales of the machines. As the Circuit Court has said:

"The contract made in April, 1897, between the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company, was not a contract in restraint of trade nor was it an attempt to create a monopoly. It was merely a contract making the Creamery Package Manufacturing Company the sales agent of the Owatonna Manufacturing Company, and I do not think it violates the act" (Rec., p. 566).

A great deal is said in the brief for plaintiffs in error about the clause in this contract by which the Owatonna Manufacturing Company undertakes to—

"promptly and vigorously attack infringers of any and all of said patents concerning combined churns and butterworkers."

It is argued that this provision of the contract is evidence of a conspiracy, between the parties thereto, to bring malicious and unfounded suits against all other manufacturers of combined churns and butterworkers, and thereby to obtain a monopoly by driving such other manufacturers out of the field. There is, of course, no basis whatever for any such inference. The contract only requires the Owatonna Manufacturing Company to prosecute infringers. This, of course, it had a right to do. The United States Government having granted a patent, and having provided, by statute, the method

of prosecution of infringers, and having provided the courts and legal machinery by which such prosecutions may be carried on, it is the absolute right of the owner of any patent to protect the grant, made to him by the Government, by the means and in the manner provided by law. This is an elementary proposition which has been upheld so many times by the Federal Courts that we do not need to cite authorities therefor.

## The Creamery Contract of June, 1898.

We have pointed out that in April, 1897, the Owatonna Manufacturing Company had enforced its patent against Fargo & Company, and had obtained a preliminary injunction in the United States Circuit Court, which injunction was in force on April 19, 1897, when the contracts with the Disbrows and the Creamery Company were made (Rec., p. 299 and p. 318). Fargo & Company after being enjoined from making their Style A machine brought out another combined churn and butterworker at some time during the same year, which was called the "Victor" (Rec., p. 299). No claim was ever made that this machine was an infringement of the Disbrow patents (Rec., p. 222). In June, 1898, it appeared that the C. samery Company had acquired the combined churn and butterworker business of F. B. Fargo & Company. It now had the selling agency of the Disbrow machine from the Owatonna Manufacturing Company, and was engaged in the manufacture of the Victor combined churn and butterworker formerly manufactured by F. B. Fargo & Company. The suit brought by the Owatonna Manufacturing Company against

F. B. Fargo & Company, in which a prelimmary injunetion had been granted prior to 1897, had now progressed to the point where the proofs had all been taken and the testimony printed. The case was therefore ready for final hearing. The sales contract of April, 1897, did not prevent the Creamery Company from manufacturing or selling other combined churns and butterworkers. It simply gave the Creamery Company the exclusive sales agency of the machines manufactured by the Owatonna Manufacturing Company. There was nothing in this contract which would prevent the Creamery Company from pushing the sale of its own machine while retaining the exclusive sale of the Disbrow machines. As the United States courts only grant preliminary injunctions, in patent cases, when fully satisfied both as to the validity of the patent sued upon and its infringement by the defendant, there could be no reason to suppose that the court would not decide against Fargo & Company at the final hearing of the suit then pending. Naturally the Creamery Company desired to compromise the costs and damages which it would be required to pay upon a final decree in the Fargo case. Just as naturally, the Owatonna Manufacturing Company was desirous of guarding against any discrimination by the Creamery Company in the sale of combined churns and butterworkers, in favor of the Victor machines and against the Disbrow. Naturally also the Owatonna Manufacturing Company did not want any further litigation. For the purpose of settling these matters, as appears upon its face, the contract of June, 1898, was entered into, as a supplement to the sales contract of April, 1897. It settled the amount of damages to be paid by the Creamery Company in the Pargo suit. It provided that that suit should be submitted to the court for final decision upon the record already prepared and printed. It provided that the Creamery Company should not discriminate against the machines manufactured by the Owatonna Manufacturing Company, but that it should give to the sale of machines made by said Owafonna Manufacturing Company the same effort and energy as it did to the sale of machines that it might manufacture or might buy from other manufacturers. It also provided that an extra compensation should be made to the Owatonna Manufacturing Company if fifty-five per cent of all the machines sold by the Creamery Company in any year were not of the Owatonna Manufacturing Company's make. Creamery Company did not agree that fifty-five per cent, or any per cent, of its sales of combined churns and butterworkers should be of the Owatonna Manufacturing Company's make. It merely agreed that if it did not sell fifty-five per cent of machines made by the Owatonna Manufacturing Company, in any year, it would pay that company an additional compensation. The contract left the Creamery Company with the right to manufacture any kind of combined churn and butterworker, except one that would infringe upon the Disbrow patents owned by the Owatonna Manufacturing Company, and it expressly recognized the right of the Creamery Company to push, with equal energy, machines of its own manufacture, or those which it "may buy from other manufacturers." The only advantage that could accrue to the Owatonna Manufacturing Company in the use of its machines by the public must result from its producing a superior machine.

In reference to the contracts between the Owatonna Manufacturing Company, and the Creamery Company, the Circuit Court of Appeals said:

> "As already indicated, we do not think the contract between the Owatonna Manufacturing Company, and the Creamery Package Manufacturing Company, giving the Creamery Company the exclusive sale of the Manufacturing Company's output, tended to suppress competition. The Manufacturing Company had the right to select its customers, and to sell and to refuse to sell to whomsoever it chose (Whitwell vs. Continental Tobacco Company, 125 Fed., 454, 60 C. C. A., 290, 64 L. R. A., 689), and the provision making the Creamery Company its sole sales agent was a usual and reasonable method of providing for the disposition of its product. The effect of this contract, if, indeed, it had any effect, upon interstate or international commerce, was only incidental and indirect. The sole purpose of the contract, as we view it, was to settle pending and threatened litigation, and to secure to the Owatonna Manufacturing Company the right to manufacture and dispose of its product under certain patents, and to foster its trade and increase its business. In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with the interstate or international commerce. Cincinnati, etc., Packet Company vs. Bay, 200 U. S., 179, 26 Sup. Ct., 208, 50 L. Ed., 428. The same is true of the agreement between the same parties of June 4,

1898, which was an agreement for the settlement of certain litigation, and provided that the Owatonna Manufacturing Company should have the right to manufacture 55 per cent of the total yearly sales made by the Creamery Company or be compensated in damages. This contract was merely supplemental to the contract of April 19, 1897, which contained no provision as to the amount of sales of the Owatonna Manufacturing Company's product should be made by the Creamery Company, and this omission was supplied by this contract. Its only effect was to foster the interests of the Owatonna Manufacturing Company, and did not affect competition."

### The Suit for Infringement of Patent.

It is not claimed that any damage resulted to the plaintiffs in error from any act of the Owatonna, Manufacturing Company except the bringing and the prosecution of the suit in the United States Court for the infringement of its letters patent No. 585100. As this suit resulted in a dismissal of the bill of complaint on the ground that the patent was invalid "for lack of invention in view of the prior art," it is not possible that the plaintiffs in error were put out of business as a result of this suit. There is no testimony in the record showing that anything was done by the Owatonna Manufacturing Company, either before or during the pendency of the suit, to interfere with the business of the plaintiffs in error, and it does clearly appear that the plaintiffs in error continued in business until enjoined by the order of the court in the Creamery Company's suit. In short,

the business which the plaintiffs in error were carrying on was not legitimate. It was the manufacture and sale of an infringing machine, the continuance of which was prohibited by the court. It clearly appears, from Mr. Virtue's own testimony, that the business of manufacturing and selling the combined churns and butterworkers was continued until the injunction was insued by the court (Rec., pp. 556-557).

It is argued by plaintiffs in error that the suit brought by the Owatonna Manufacturing Company was wholly groundless. There is no basis for any such statement. The court did not find that the defendants' machine did not infringe the patent in suit. It did not pass upon the question of infringement, but dismissed the bill for in ratidity of the patent "for lack of invention." In view of the fact that the question whether a patented article does or does not exhibit invention, is one of the most difficult that the courts are called upon to decide, the fact that Judge Amidon differed from the officials of the patent office upon the question of invention, involved in the patent in this suit, furnishes no ground for arguing that the suit was without merit. The courts have recognized, in many cases, the difficulty of determining whether the production of a patented device required the exercise of invention or the skill of a echanic. In Kinloch Telephone Company v. Western Blectric Co., 113 Fed., 664, Judge Sanborn, in delivering the epinion of the Circuit Court of Appeals for the Eighth Circuit in a patent case, said:

> "Our conclusion is that the patents of Eldred and Durant and of Kellogg do not anticipate or suggest the combination of Seeley. The

question recurs, did it require any exercise of the inventive faculty to produce his combination, in view of the state of the art which the multiple switchboard of Freeman and these patents disclose? No one has yet been able to formulate a test whereby a line of demarkation between the products of the inventor's intuition and the results of the skill of the mechanic may be surely drawn in all cases as they arise. That question is and always must be left for determination by a careful exercise of the judgment, enlightened by a knowledge of the state of the art and of the advance in it which the device in question marks, and guided by the established rules and principles of the law. The two classes of cases led by Atlantic Works v. Brady, 107 W. S., 192, 200, 2 Sup. Ct., 225, 27 L. Ed., 438, and Loom Co. v. Higgins, 105 U. S., 580, 590, 26 L. Ed., 1177, have been again cited and reviewed for our guidance, and have been carefully considered in reaching our conclusion. A plausible and persuasive argument may be made that this combination falls under either class of cases, that it might have been and was produced by the skill of the trained mechanic or by the intuitive genius of the inventor."

If this action was malicious and without probable cause, it was open to the plaintiffs in error to bring suit in a court of competent jurisdiction for malicious prosecution. They did bring such a suit in the State Court for Steele County, and the judgment of that court, which is pleaded by each of the defendants herein, and is admitted by the reply, is persuasive that

the infringement suit was not malicious and without probable cause, and in view of the difficulties of distinguishing between invention and mechanical skill, is conclusive on that subject.

In reference to the bringing of the two infringement suits at the same time and by the same counsel the Circuit Court of Appeals said:

> The mere fact that the two infringement suits were brought upon the same day and the defendants were represented by the same counsel does not show, or even tend to show, that they were brought for any purpose other than the enforcement of the legal rights of the owners of the patents. It falls far short, it seems to us, of establishing an agreement or conspiracy between the defendants to bring these suits at the same time for the purpose of driving the plaintiffs out of business, and after a patient and thorough examination of the record we think the Circuit Court was fully justified in holding that there was no evidence offered at the trial "which would warrant the jury in finding that any agreement of that kind existed."

## The Assignments of Error.

A large number of the assignments of error are to rulings of the circuit court sustaining objections of the defendants as to the admissibility of evidence. No exceptions were taken by plaintiffs to the ruling of the court on the matters set forth in assignments numbered 4, 10, 12, 13, 15, 16, 17, 18, 19 and 20. The rulings set forth in these assignments of error are there-

fore not before this court for consideration. In Petter v. United States, 122 Fed., 55, the court said:

"It is indispensible to a review in the courts of the United States of any ruling of a trial court on the admissibility of evidence that it should be challenged, not only by an objection, but by an exception taken and recorded at the time, to the end that the attention of the trial under may be sharply called to the question presented, and that a clear record of his action and its challenge may be made. Hutchins v. King, 1 Wall., 53, 60, 17 L. Ed., 544; Pomeroy's Lessee v. Bank of Indiana, 1 Wall., 592, 602, 17 L. Ed., 638; Newport News & Miss. Valley Co. v. Pace, 158 U. S. 36, 37, 15 Sup. Ct., 743, 39 L. Ed., 887; Tucker v. U. S., 151 U. S. 164, 170, 14 Sup. Ct., 299, 38 L. Ed., 112."

See also Felton v. Newport (C. C. A. 6th Circuit), 92 Fed., 470; Johnson v. Garber (C. C. A. 6th Circuit), 73 Fed., 523.

The assignment of error numbered 21 relates to certain testimony of the witness Levi A. Disbrow as to a conversation had by him with the defendant in error Frank LaBare, which was originally admitted by the trial court as to the Owatonna Manufacturing Company, and was afterwards stricken out by the court, on motion of that defendant. This ruling of the court was clearly correct. The testimony of this witness was to the effect that Mr. LaBare had asked him to see his brother, who was expected to be a witness in the patent suit, and have him go to some point where he could be interviewed by Mr. Paul who was conducting the patent suits as attorney for both complainants. This

testimony was clearly immaterial to any issue in this cause; it does not show or tend to show any conspiracy to drive the defendants out of business by any act in violation of the Sherman Law. While it is true that Mr. LaBare was, at that time, president of the Owatonna Manufacturing Company any such request, if made by him, was clearly outside of his duties as president of that company and was not binding upon either corporation.

Browning v. Hinkle, 48 Minn., 544. Cook on Stock and Stockholders, Vol. 2, Sec. 726, p. 1110.

So far then as the Owatonna Manufacturing Company and Frank LaBare are concerned there is a total absence of any evidence that either of them violated the Sherman Anti-Trust Law, or joined with anyone else in violating it. The claims made against them by plaintiffs in error are wholly without support in the record.

We submit therefore that the judgment as to them should be affirmed.

W. A. SPERRY, AMASA C. PAUL,

Attorneys for Owatonna Manufacturing
Company and Frank La Bare.

VIRTUE . CREAMERY PACKAGE MANUFACTURING COMPANY AND OWATONNA COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 80. Argued December 9, 10, 1912.—Decided January 20, 1913.

To sustain an action under § 7 of the Sherman Act a necessary element is cooperation by some of the defendants in a scheme involving monopoly or restraint of interstate trade and causing the damage complained of.

#### 227 U. B.

#### Argument for Plaintiff in Brees.

The owner of a patent has exclusive rights of making, using and selling, which he may keep or transfer in whole or in part.

Patents and patent rights cannot be made a cover for violation of law; but they are not so used when only the rights conferred by law are exercised.

Patent rights can be protected by a party to an illegal combination.

While the combined effect of the separate acts alleged to have made the combination illegal must be regarded as a whole, the strength of each act must be considered separately.

Assertion of patent rights may be so conducted as to constitute malicious prosecution; but failure of plaintiff to maintain the action does not necessarily convict of malice.

Mere coincidence in time in the bringing by separate parties of suits for infringements on patents against the same defendant held, in this case, not to indicate a combination on the part of those parties to injure the defendant within the meaning of § 7 of the Sherman Anti-trust Act.

A contract by which a manufacturer of a patented article appoints another who does not manufacture or sell like articles, his exclusive agent for the output of the factory, held in this case not to violate the Sherman Act.

Where an action under § 7 of the Sherman Act was tried in the Circuit Court and argued in the Circuit Court of Appeals on the basis of cooperation between the defendants, this court will not consider a contention raised for the first time that one of the defendants was itself a combination offensive to the statute.

In this case it does not appear that the contracts between the defendants were made for the purpose of injuring the plaintiff, and both courts below having so held this court also so holds.

179 Fed. Rep. 115, affirmed.

The facts, which involve the construction of § 7 of the Sherman Anti-trust Act and what constitutes an illegal combination thereunder, are stated in the opinion.

Mr. Harlan E. Leach, with whom Mr. James F. Williamson and Mr. James A. Tawney were on the brief, for plaintiff in error:

It is not necessary to prove the commission of any tort, wrongful act or crime on the part of defendants, aside from what is prohibited by the terms of the Sherman Anti-trust Act, in order to make the defendants liable

in damages to the plaintiffs in this action. Loeve v. Lawlor, 208 U. S. 274; Montague v. Lowry, 193 U. S. 38; Chattaneoga F. & P. Works v. Atlanta, 203 U. S. 390; Jayne v. Loder, 149 Fed. Rep. 21; Wheeler-Stenzel Co. v. National Window Glass Ass'n, 152 Fed. Rep. 864, S. C., 10 L. R. A. (N. S.) 972; Penn. Sugar Co. v. Am. Sugar Co., 166 Fed. Rep. 254; People's Tobacco Co. v. Am. Tobacco Co., 170 Fed. Rep. 396; Monarch Tobacco Works v. Am. Tobacco Co., 165 Fed. Rep. 774; Swift v. United States, 196 U. S. 395.

The act of combining—the concerted action—is unlawful in itself, and is the basis of a cause of action for damages. Loewe v. Lawlor; Swift v. United States; Penn. Sugar Co. v. Am. Sugar Co.; Jayne v. Loder, supra; Aikens v. Wisconsin, 195 U. S. 194; Ellis v. Inman, 131 Fed. Rep. 182.

It is not necessary that the act which caused the damage should be anything in itself prohibited by the Antitrust Act. It is not necessary that it be a step in the formation of the "contract," "combination" or "conspiracy" or a step in the attempt to secure monopoly. It is sufficient if such an act originated in, or was directly associated with, the motives which were the cause of the contract, combination, conspiracy or attempt to secure monopoly. Chattanooga Works v. Atlanta, 203 U. S. 390.

Plaintiffs in error were engaged in interstate trade and commerce. Loewe v. Lawlor; Montague v. Lowry; Penn. Sugar Co. v. Am. Sugar Co., supra; Shawnee Compress Co. v. Anderson. 209 U. S. 423.

Every agreement or transaction whose direct effect is to destroy or prevent competition is in restraint of trade. Northern Securities Co. v. United States, 193 U. S. 197; United States v. American Tobacco Co., 164 Fed. Rep. 700; Shawnee Compress Co. v. Anderson, 209 U. S. 423; United States v. Trans. Mo. Freight Ass'n, 166 U. S. 290; United States v. Joint Traffic Ass'n, 171 U. S. 505.

227 U.S. Argument for Plaintiff in Error.

A scheme or contract whereby a corporation disposes of its business, and agrees to ever thereafter remain out of business, is illegal and void, under the Sherman Antitrust Act. Shawnes Compress Co. v. Anderson, 209 U. S. 423.

A combination has obtained a monopoly when it has reached a position where it can control prices and suppress competition. *United States* v. Am. Tobacco Co., 164 Fed. Rep. 700, 721.

Where the necessary and direct effect of the combination is to restrain trade or effectuate a monopoly, the intent is immaterial. Addyston Pips & Steel Co. v.

United States, 175 U.S. 211.

But where acts in themselves are not directly in restraint of trade or do not directly tend towards a monopoly, or are only an attempt, the intent of the parties becomes material. Swift v. United States; Loewe v. Lawlor, supra; Penn. Sugar Co. v. Am. Refining Co., 166 Fed. Rep. 254; Bigelow v. Calumet & Hecla Co., 167 Fed. Rep. 704. 709.

In cases of conspiracy it is always permissible to allege and prove the history and various steps culminating in the final conspiracy, even though the previous steps were separate and distinct offenses, if they tend to throw light on the present conspiracy and to show the intent with which the final acts were committed. Wharton on Criminal Ev., § 32; Greenleaf on Ev., § 111; 8 Cyc., pp. 677, 678, 684; Swift v. United States, 196 U. S. 395; United States v. Greene, 115 Fed. Rep. 344; Lincoln v. Clafin, 7 Wall. 132; Mut. Life Ins. Co. v. Armstrong, 117 U. S. 508; Moline-Milburn Co. v. Franklin, 37 Minnesota, 137.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it in operation. United States v. Standard

them and create a monopoly, is in violation of the Sherman Anti-trust Act. Blownt Mfg. Co. v. Yale, 166 Fed. Rep. 555; National Harrow Co. v. Hench, 83 Fed. Rep. 36; S. C., 76 Fed. Rep. 667; S. C., 84 Fed. Rep. 226; Bobbs-Merrill Co. v. Strauss, 139 Fed. Rep. 155; Strait v. National Harrow Co., 18 N. Y. Supp. 224; National Harrow Co. v. Bement, 47 N. Y. Supp. 462; Mines v. Scribner, 147 Fed. Rep. 927; Bement v. National Harrow Co., 186 U. S. 70.

The court will not render its aid to the carrying out of a scheme prohibited by the Sherman Anti-trust Act. National Harrow Co. v. Hench, 84 Fed. Rep. 226; Continental Wall Paper Co. v. Voight, 212 U. S. 227; Levy v. Kansas City, 168 Fed. Rep. 524; Northern Sec. Co. v. United States; McMullen v. Hoffman; Thomson v. Thomson, supra.

Every combination resulting directly or necessarily in restraint of interstate trade is prohibited. It is immaterial what kind of a combination it is; none is exempt; a combination to prosecute law suits is as much prohibited as

any other. See cases cited supra.

To wrongfully charge infringement is an actionable wrong. This is true apart from any claim of violation of Sherman Anti-trust Act. (Also to say that a person has no patent, or valid patent.) Culmer v. Canby, 101 Fed. Rep. 195; 25 Cyc. 263; Bowsky v. Cimiotti Unhairing Co., 76 N. Y. Supp. 465; Watson v. Trask, 6 Ohio, 531; Cousins v. Merrill, 16 U. C. C. P. 114; Meyrose v. Adams, 12 Mo. App. 329; 25 Cyc. 559; Flint v. Hutchinson Burner Co., 110 Missouri, 492; Germ Proof Filter Co. v. Pasteur Filter Co., 81 Hun, 49; Wren v. Weild, L. R. 4 Q. B. 731; Swan v. Tappan, 5 Cush. 104; McElwee v. Blackwell, 94 Nor. Car. 261; Snow v. Judson, 38 Barb. 210; Dicks v. Brooks, L. R. 15 Ch. Div. 22; Barley v. Walford, 9 Q. B. 197.

To take away plaintiff's customers by intimidation and threats renders defendants liable to damages under the Sherman Anti-trust Act. Loewe v. Lawlor, 208 U. S. 274; People's Tobacco Co. v. Am. Tobacco Co., 170 Fed. Rep. 396.

227 U. S. Argument for Plaintiff in Error.

Plaintiffs have a cause of action at common law. The Creamery Package Company not having any title to the patents it sued upon, had no right or authority to prosecute its suit. It is the same as where a person brings a suit in the name of another without any authority for so doing. The person so doing must be charged with knowledge of the kind of a title it had. 38 Cyc. 517; Bond v. Chapin, 8 Metc. 31; Moulton v. Lowe, 32 Maine, 466; Foster v. Dow, 29 Maine, 442; Smith v. Hyndman, 10 Cush. (Mass.) 554; Streeper v. Ferris, 64 Texas, 12; Hackett v. McMillan, 112 Nor. Car. 513; Metcalf v. Alley, 24 Nor. Car. 38.

The contracts, conspiracy and combination of the two defendant corporations are clearly illegal, under both §§ 1 and 2 of the Anti-trust Act and also at common law. Continental Wall Paper Co. v. Voight &c. Co., 212 U. S. 227; Standard Oil Co. v. United States, 221 U. S. 1; United States v. Am. Tobacco Co., 221 U. S. 106; Minnesota v. Creamery Package Co., 110 Minnesota, 415, 437; S. C., 115 Minnesota, 207; Peck v. Heurich, 167 U. S. 624; Thompson v. Thompson (1802), 7 Ves. 468; Hilton v. Woods (1867), L. R. 4 Eq. 432; Scott v. Brown (1892), 2 Q. B. 724; Clark v. Hagar (1894), 22 Can. Sup. Ct. 510; Power v. Phelan (1884), 4 Dorion (Quebec) 57; Little v. Hawkins (1872), 19 Grant Ch. (U. C.) 267 (Ontario); Colville v. Small, 22 Ont. L. Rep. 426; 19 Ann. Cas. 515, citing Continental Wall Paper Co. Case, supra; Johnson v. Van Wyck, 4 App. D. C. 294; Gregerson v. Imlay, 4 Blatchf. 503; 10 Fed. Cas. No. 5795; Pinney v. First Nat. Bank, 68 Kansas, 223; 75 Pac. Rep. 119; 1 Ann. Cas. 331; Wehmhoff v. Rutherford, 98 Kentucky, 91; 32 S. W. Rep. 288; Gilroy v. Badger, 27 Misc. Rep. 640; 58 N. Y. Supp. 392; Gescheidt v. Quirk, 66 How. Pr. 272; Roberts v. Yancey, 94 Kentucky, 243; 21 S. W. Rep. 1047; 42 Am. St. Rep. 357; Miles v. Mutual Reserve Fund Life Ass'n, 108 Wisconsin, 421; 84 N. W. Rep. 159; Brynjolfson.v. Dagner (N. Dak.), 109 N. W. Rep. 320; Burke v. Scharf (N. Dak.), 124 N. W. Rep. 79; Keiper v. Miller, 68 Fed. Rep. 627 (affirmed in 70 Fed. Rep. 128; 16 C. C. A. 679).

A plaintiff cannot maintain an action for damages for infringement of letters patent, but his action must be dismissed, when he acquired the title to his cause of action and claim through a contract against public policy because champertous. 6 Cyc. 881, 882, 889; Stewart v. Welch, 41 Oh. St. 483.

No title to property can be acquired where the act of such acquisition is criminal, or prohibited by statute, or where the transfer is made as a part of, or a step in, or pursuant to, an act prohibited by statute or against public policy. Pearce v. Rice, 142 U. S. 28; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24; Miller v. Ammon, 145 U. S. 421; 20 Cyc. 937, 938, and cases cited; Holman et al. v. Ringo, 36 Mississippi, 690.

The assignment or transfer of a negotiable security upon an illegal consideration is void, and confers no title to the instrument on the assignee; and hence the maker of the note given upon a valid consideration, may defeat a recovery upon it by an assignee who won it at a game of cards. Drinkall v. Movius State Bank, 11 N. Dak. 10; 14 Am. & Eng. Ency. of Law (2d ed.), 647, 468; Thomas v. First Nat. Bank, 213 Illinois, 261; Burke v. Buck, 31 Nevada, 74; 99 Pac. Rep. 1078; 21 Ann. Cas. 625.

Without the active assistance of a willing court, the trust and unlawful object must have failed; with such assistance, it was perfected. A court will not lend its aid to the accomplishment of an unlawful object. Peck v. Heurich, 167 U. S. 624; Graham v. LaCrosse &c. Co., 102 U. S. 148; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24; Haffman v. Bullock, 34 Fed. Rep. 248; Forker v. Brown, 30 N. Y. Supp. 827; Gruber v. Baker, 20 Nevada, 472; 9 L. R. A. 308.

## Argument for Defendants in Error. 227 U. S.

The object and purpose of a trust must be legal. 28 Am. & Eng. Ency. of Law (2d ed.), 866, 867, and cases cited.

An association formed for an unlawful purpose cannot sue. 30 Cyc. 29.

A corporation cannot be formed for an unlawful pur-

pose. 10 Cyc. 161, and notes.

It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly. Pope Mfg. Co. v. Gormully, 144 U. S. 288; Minnesota v. Creamery Package Mfg. Co., supra.

Mr. Emanuel Cohen and Mr. Amasa C. Paul, with whom Mr. John B. Atwater, Mr. Frank W. Shaw, Mr. George C. Fry and Mr. W. A. Sperry were on the briefs, for defendants in error:

The 1897 centract between the two defendants was not in restraint of trade, nor an attempt to create a

monopoly.

In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce. Cincinnati &c. Packet Company v. Bay, 200 U. S. 179; Hopkins v. United States, 171 U. S. 578, 592; United States v. Joint Traffic Association, 171 U. S. 505, 568; Anderson v. United States, 171 U. S. 604, 615; Addyston Pipe Co. v. United States, 175 U. S. 211, 229; Northern Securities Co. v. United States, 193 U. S. 197, 331; Field v. Barber Asphalt Co., 194 U. S. 618, 623; Standard Oil Co. v. United States, 221 U.S. 1, 66; Union Pacific Coal Co. v. United States, 173 Fed. Rep. 737.

The agreement of June, 1898, between the two defend-

ants was not in violation of the Sherman Act.

Even if the Creamery Company were assumed to be a party to an unlawful combination in restraint of trade, this would not deprive it of its right to sue for infringement of its patents. Strait v. National Harrow Company, 51 Fed. Rep. 819; Connolly v. Union Sewer Pipe Company, 184 U. S. 540. See also Fritts v. Palmer, 132 U. S. 282; Dickerman v. Northern Trust Co., 176 U. S. 181, 190, South Dakota v. North Carolina, 192 U. S. 286, 311; Harriman v. Northern Securities Co., 197 U. S. 244, 291; In re Metropotitan Railway Receivership, 208 U. S. 90, 111; International Harvester Co. v. Clements, 163 Michigan, 55.

None of the contracts contained any provisions for bringing action against alleged infringers of patents for

the purpose of driving them out of business.

The evidence did not warrant the jury in finding any agreement or conspiracy between the defendants to bring the patent suits for the purpose of driving the plaintiffs out of business.

The owner of a patent may notify infringers of his claims and warn them that unless they desist, suits will be brought to protect him in his legal rights. The only limitation on the right to issue such warnings is the requirement of good faith. Kelly v. Ypsilanti Dress Stay Co., 44 Fed. Rep. 19; Computing Scales Co. v. National Computing Scale Co., 79 Fed. Rep. 962; Farquhar Co. v. National Harrow Co., 102 Fed. Rep. 714; Adriance, Platt & Co. v. National Harrow Co., 121 Fed. Rep. 827; Warren Featherbone Co. v. Landauer, 151 Fed. Rep. 130; Mitchell v. International &c. Co., 169 Fed. Rep. 145; 30 Cyc. 1054.

There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution

of the infringement suits.

The 1897 agreements had to do solely with the settlement of litigation then existing or apprehended, with the result that a large amount of litigation was settled, and the parties relieved from vexation and expense and enabled to proceed with their business. Benent v. National Harrow Co., 186 U. S. 70, 93.

227 U.S. Argument for Defendants in Error.

None of the 1897 agreements was in restraint of trade. The restraint of trade was not greater than the circumstances of the transaction required. Cincinnati &c. Packet Co. v. Bay, 200 U. S. 176; Shawnee Compress Co. v. Anderson, 209 U. S. 423; Whitwell v. Continental Tobacco Co., 125 Fed. Rep. 454, 461. Stipulations of the kind involved are frequent and valid. Littlefield v. Perry, 21 Wall. 205. They do not contravene public policy. Westinghouse Co. v. Chicago &c. Co., 85 Fed. Rep. 786; Reece Co. v. Fenwick, 140 Fed. Rep. 287, 288.

Nor was the June, 1898, agreement in restraint of trade. The stipulations in the Owatonna Manufacturing Company agreements as to prosecuting infringers were usual covenants, not warranting the inference of a purpose to drive competitors out of business by groundless suits. See collections of forms in Jones' Legal Forms, pp. 735, 739, 741; Foster v. Goldschmidt, 21 Fed. Rep. 70; Macon Knitting Co. v. Leicester Con. Mills Co., 113 Fed. Rep. 844; Wilfley v. New Standard Con. Co., 164 Fed. Rep. 421; Critcher v. Linker, 169 Fed. Rep. 653; Jackson v. Allen, 120 Massachusetts, 64; The Forncrook Mfg. Co. v. Barnum Wire Co., 63 Michigan, 195; Croninger v.

Southern Fire Co., 37 Fed. Rep. 428.

The Owatonna agreements had to do wholly with manufacture, and were thus beyond the purview of the Sherman law. United States v. Knight Co., 156 U. S. 1; United States v. Northern Securities Co., 120 Fed. Rep. 721, 728; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 616; Cornell v. Coyne, 192 U. S. 418, 428; Loeve v.

Paige, 48 Wisconsin, 229; Washburn & Moen Mfg. Co. v.

Lawler, 208 U.S. 274, 297.

The Owatonna agreements had to do wholly with patented articles and were thus beyond the purview of the Sherman law. Bement v. National Harrow Co., 186 U. S. 70, 91; Henry v. Dick Co., 224 U. S. 1, 28.

The general agreement had for its purpose the pre-

vention of ruinous competition in churns and the avoidance and settlement of litigation and did not constitute an undue restraint of interstate commerce within the Sherman law, nor does it show a design to drive competitors out of business by groundless suits. Whitwell v. Continental Tobacco Co., 125 Fed. Rep. 454; United States v. Standard Oil Co., 173 Fed. Rep. 177.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Cincinnati Packet Co. v. Bay, 200 U. S. 179, 184.

The subsequent conduct of the Creamery Company in using names other than its own, and in acquiring other concerns, does not tend to show a design to drive competitors out of business.

The Creamery Company has never monopolised or attempted to monopolise any part of interstate commerce within the meaning of the Sherman Act. See Noyes on Corporate Relations, § 389, p. 711; National Cotton Oil Co. v. Texas, 197 U. S. 115.

Even if the Creamery Company had monopolised a substantial part of interstate commerce, no causal connection is shown between its acts and the damages claimed by plaintiffs. 21 Am. & Eng. Ency. (2d ed.), 480; 29 Cyc., 439.

An executed illegal contract carries title to its subject-matter in the same way as if the contract were legal, unless the law violated declares to the contrary. 15 Am. & Eng. Ency. 932; McMullen v. Hoffman, 174 U. S. 639; Fritts v. Palmer, 132 U. S. 282.

The Sherman law does not forbid the passage of title, but on the contrary impliedly sanctions it. Connolly v. Union Sever Pipe Co., 184 U. S. 540; Harriman v. Northern Securities Co., 197 U. S. 244.

The executed illegal contract is given the same effect as respects the passage of title as would be given to a legal 227 U. S. Argument for Defendants in Error.

contract of the same tenor and effect. Strait v. National Harrow Co., 51 Fed. Rep. 819; Edison Electric Light Co. v. Sawyer Mann Electric Co., 53 Fed. Rep. 592; Soda Fountain Co. v. Green, 69 Fed. Rep. 333; Bonsack Machine Co. v. Smith, 70 Fed. Rep. 383; Saddle Co. v. Troxel, 98 Fed. Rep. 620; National Folding Box Co. v. Robertson, 99 Fed. Rep. 985; Otis Elevator Co. v. Geiger, 107 Fed. Rep. 131; General Electric Co. v. Wise, 119 Fed. Rep. 922; Fuller v. Berger, 120 Fed. Rep. 274; Motion Picture Patents Co. v. Laemmle, 178 Fed. Rep. 104; Motion Picture Patents Co. v. Ullman, 186 Fed. Rep. 174; but see contra, National Harrow Co. v. Quick, 67 Fed. Rep. 130, which was affirmed on a different ground.

The plaintiffs suffered no damage by the successful

prosecution of the suit against them.

The system of remedies applied in Federal courts does not permit a pending suit in equity to be used as a ground

of recovery at law.

The plaintiffs are in fact prosecuting a suit for malicious prosecution in defiance of the rule that such a suit is not maintainable unless the primary suit has terminated in their favor.

Under the Sherman Act the injury counted on must be of a kind actionable at common law. The statute does not override the rules as to damnum abeque injuria. Whitsell v. Continental Tobacco Co., 125 Fed. Rep. 454, 461; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 561; Smith v. Wilcox, 47 Vermont, 537, 545; Hortenstine v. Virginia-Carolina Ry. Co., 102 Virginia, 914; Connolly v. Western Union Telegraph Co., 100 Virginia, 51; Tyler v. West. Un. Tel. Co., 54 Fed. Rep. 634; Crescent Live Stock Co. v. Slaughter House Co., 120 U. S. 141, 147; 26 Cyc. 55.

According to the weight of authority and reason a suit for the malicious prosecution of a civil action is not maintainable unless there be an interference with person or property. Willard v. Holmes, 142 N. Y. 492; Burt v. Smith, 181 N. Y. 1.

The difference of opinion is stated and the cases collected in 21 Am. Law Reg. 281-353 (article by Lawson); 93 Am. St. Rep. 466-469 (article by Freeman); McCormick Harvester Machine Co. v. Willan, 63 Nebraska, 391; 4 Current Law, pp. 472-474 (article by Longsdorf); 19 Am. & Eng. Ency. 652, 653; 26 Cyc., pp. 14-16; Wetmore v. Mellinger, 64 Iowa, 741; Dorr Cattle Co. v. Des Moines National Bank, 127 Iowa, 153; Smith v. Michigan Buggy Co., 175 Illinois, 619; Potts v. Imlay, 4 N. J. L. 377; Luby v. Bennett, 111 Wisconsin, 613; contra, see Kolka v. Jones, 6 N. Dak. 461; 71 N. W. Rep. 558; Burnap v. Albert, 4 Fed. Cas. 761 (No. 2170); Cooper v. Armour (C. C., N. Y.), 42 Fed. Rep. 215; Bishop v. American Preservers Co. (C. C., Ill.), 51 Fed. Rep. 272; Wade v. National Bank of Commerce (C. C., Wash.), 114 Fed. Rep. 377; Tamblyn v. Johnston (C. C. A., 8th Circ.), 126 Fed. Rep. 267, 270; Wilkinson v. Goodfellow-Brooks Shoe Co. (C. C., Mo.), 141 Fed. Rep. 218.

Even in jurisdictions where a suit may be maintained without interference with persons or property the want of probable cause must be very clearly proven. There is in this case no evidence at all of want of probable cause. Eickhoff v. Fidelity &c. Co., 74 Minnesota, 139; Bigelow, Torts, 78; Newall, Mal. Pros. 35; Cooley, Torts, 207; Ferguson v. Arnow, 142 N. Y. 580, 583.

Even if the prosecution of the Owatonna Manufacturing Company's suit constituted an actionable injury, such injury did not arise from anything forbidden or declared unlawful by the Sherman Act.

The complainants have waived their right to the penalty under the Sherman Act by bringing suit in the state court for malicious prosecution. Attna Insurance Co. v. Swift, 12 Minnesota, 437, 445; 7 Ency. Pl. & Pr. 364; 15 Cyc. 260; Robb v. Vos, 155 U. S. 13; Bierce v. Hutchins, 205 U. S. 340, 346; Klipstein & Co. v. Grant, 141 Fed. Rep. 72; Water Co. v. Hutchinson, 160 Fed. Rep. 41.

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A patent owner may notify infringers of his claims and threaten them with a suit unless they desist. If he does this in good faith, believing his claims to be valid, and brings his suit with reasonable diligence he is acting within his rights and incurs no liability. There is no evidence of bad faith in the record. Kelley v. Ypsilanti Mfg. Co., 44 Fed. Rep. 119; Computing Scale Co. v. National Scale Co., 79 Fed. Rep. 962; Farquhar Co. v. National Harrow Co., 102 Fed. Rep. 714; Adriance, Platt & Co. v. National Harrow Co., 121 Fed. Rep. 827; Warren Featherbone Co. v. Landauer, 151 Fed. Rep. 130; Dittgen v. Racine Paper Goods Co., 164 Fed. Rep. 84; Mitchell v. International &c. Co., 169 Fed. Rep. 145.

The warnings considered as a separate cause of action were barred by the statute of limitations. Chattanooga Foundry Co. v. Atlanta, 203 U. S. 390; Huntington v. Attrill, 146 U. S. 657, 608; Brady v. Daly, 175 U. S. 148,

155, 156.

There is nothing in the evidence to show that either of the defendants had any improper or unlawful connection with the infringement suit brought by the other.

A combination to bring suits is not within the Sherman

The public is not entitled to competition among patent Act. owners or licensees, and therefore combinations relating to United States patents are not within the Sherman Act. Northern Securities Co. v. United States, 193 U. S. 197, 331; Board of Trade v. Christy Grain Co., 198 U. S. 236, 252.

If the Sherman Act applies to combinations among patent owners, the patentee's power of assignment is limited, and to that extent his exclusive rights are de-

stroyed.

Patent owners may lawfully secure for themselves, through a combination of their patents, a traffic, however extensive, in unpatented articles. Henry v. A. B. Dick Company, 224 U.S. 1.

Mr. JUSTICE MCKENNA delivered the opinion of the court.

Action for the recovery of damages in the sum of \$406,881.60, being the total of certain specific items mentioned in the complaint, and for all other damages sustained by plaintiffs (so designated throughout this opinion) by virtue of the facts stated, including all sums that they are entitled to under the provisions of the Sherman Antitrust Act, July 2, 1890, 26 Stat. 209, c. 647, together with an attorney's fee. The grounds of recovery are set forth in the complaint, which, inclusive of exhibits, occupies 150 pages of the record, and seems to make impossible any attempt at brevity or condensation. The case, however, is not in wide compass and attention may be concentrated upon certain considerations. The contention of plaintiffs in its most general form is that the defendants entered into a conspiracy or combination in restraint of interstate trade and in execution of it, plaintiff's aterstate business was destroyed by defendants wrongfully prosecuting two suits against them for the infringement of patents under which the articles of their trade were manufactured and by circulating slanders and libels to the effect that such articles were infringements of defendants' patents. A cause of action is hence asserted under § 7 of the Anti-trust Act. The section is as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act, and

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what is forbidden or made unlawful is expressed in \$6 1 and 2. Section 1 is as follows: "Every contract, combinstion in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. or with foreign nations, is hereby declared to be illegal. . . ."

The acts forbidden are made a misdemeanor. And by § 2 it is also made a misdemeanor for any person to "monopolise, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolise, any part of the trade or commerce among the several

States, or with foreign nations."

The question occurs. Do the facts of the case show a breach of the law by defendants and injury resulting from it to plaintiffs? The following facts are alleged: On the twenty-fourth of February, 1898, or just prior thereto, certain corporations, and one partnership were engaged in making or selling creamery supplies, including combined churns and butter workers, and transporting them in state and interstate commerce. All of the corporations and the partnership were in direct competition in their lines of business and as the result of it all of the articles manufactured and sold by them were sold at no more than a fair price and legitimate profit. The corporations controlled over 90% of the business of manufacturing and selling creamery and dairy supplies in the States of Michigan and Indians and in all the States west and in some of the States east thereof, manufacturing the articles in one or more of the States and shipping by the same common carriers from the States where manufactured to other States and distributing and selling such articles there.

On the twenty-fourth of February, 1898, the Creamery Package Manufacturing Company, one of the corporations, and its stockholders, then engaged in the manufacture and sale of dairy and creamery supplies but not of combined churns and butter workers, it being as to the latter only the agent for their sale, entered into a contract with the other corporations and the partnership by which it was agreed to increase the capital stock of the Creamery Package Manufacturing Company to enable it to purchase the property and business of the other corporations parties to the contract, including in the property all patents and applications for patents.

The contract is very elaborate and verbose, but we need not give its particular covenants as no point is made upon them; it being only alleged and contended that its purpose and effect were that the Creamery Package Manufacturing Company should acquire the property and business of the other corporations, and that while the latter should cease to exist they should be represented as continuing as separate and independent concerns and competitors in the market with the Creamery Package Manufacturing Company and with one another, while in truth and fact there would be no competition between them.

It is alleged that in execution of the purpose of the contract traveling men from the different houses under instructions from the Creamery Package Manufacturing Company met and secretly arranged the bid each should interpose, determining by lot and other ways who should interpose the lowest bid and who the highest.

The Owatonna Company was not a party to that contract, but it is contended that it participated in or is brought into the scheme and purpose of the contract by certain agreements entered into by it with the Creamery Package Manufacturing Company. They are all attached to the complaint as exhibits and may be described as transferring certain patents or the right to use certain patents to the Creamery Package Manufactur-

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ing Company. A brief summary of them is given in the margin.1

<sup>1</sup> The first of the agreements between the companies was made April 19, 1897 (that was before the contract of February 24, 1898), and recited that the Owatonna Company was the owner of certain patents covering combined churns and butter workers and was manufacturing the same and that as the Creamery Package Manufacturing Company was desirous of handling the same as sole agents, the agreement was made. It conveyed five patents issued between January, 1893, and August, 1896, and applications for another. There were provisions as to the sise, material and other details; also as to royalties to be paid to the Disbrow Manufacturing Company. And the Owatonna Company agreed to protect the Creamery Package Manufacturing Company from all suits for infringement of the patents, or claims for damages arising out of the sales of the churns and promptly and vigorously to attack infringers and to procure patents on all improvements made by it or by any person in its behalf

There was an addition to the contract made June 4, 1897, in regard to the repair parts of the "Winner" churns and the repair and perfec-

tion of the same, and the rebate from the billing price.

On January 12, 1898, a supplemental contract was made by the same parties as to the disposition of the royalties received under a license contract made September 30, 1897, with the Cornish, Curtis & Greene

Manufacturing Company, of Fort Atkinson, Wisconsin.

On June 4, 1898, another agreement was made between the parties which referred to the agreement of April, 1897, and to the pendency of litigation based on the infringement or charges of infringement of the patents with which that contract was concerned. For the purpose of adjusting all claims growing out of such infringement and settling the litigation between the Owatonna Company and F. B. Fargo & Co., whose rights the Creamery Package Manufacturing Co. had acquired, it was agreed that one of the suits which was named, and in which proofs had been taken, should be brought to a speedy hearing and all other suits dismissed.

The Creamery Package Manufacturing Company agreed not to manufacture the machine known as the "Winner" or the "Disbrow," both referred to in the contract of April, 1897, called the "sales contract," or any other of a described kind made by the Owatonna Company, but was at liberty to manufacture and sell churns and butter workers of any other construction. Satisfaction of all royalties, damages and costs was agreed on.

It is alleged that on July 8, 1904, the Creamery Package Manufacturing Company and the Owatonna Company brought suit separately in the Circuit Court of the United States for the First Division of the State of Minnesota, at Winona, against the plaintiffs, charging infringement of patents for churns and butter workers. The bills in the suits are attached to the complaint in this action and are in the usual form. Process was issued and the plaintiffs here answered. Upon proofs taken a decree was entered in favor of plaintiffs and against the Owatonna Company in the suit brought by it. It is not alleged in the complaint but it is in the answer of the Creamery

The sales contract was continued in force and there was added to it a provision entitling the Owatonna Company to furnish 55% in value at list price of the churns and butter workers sold by the Creamery Package Manufacturing Company in each year after the date of the contract. If less than that per cent. should be made and furnished by the Owatonna Company certain sums were provided to be paid by the other company. And the latter company agreed not to discriminate against the machines manufactured by the Owatonna Company in favor of machines of its own manufacture or of other manufacturers. and that it would give to the machines of the Owatonna Company the same effort and energy to effect their sale. The Owatonna Company agreed to protect the patents and prosecute infringers and give assistance to the Creamery Package Manufacturing Company in the prosecution of infringers. Permission was given to the Owatonna Company to use the "Disbrow" and "Winner" churns owned by the Creamery Package Manufacturing Company or to be acquired by it. There was also an agreement made on the 4th of June, 1898, between the parties in settlement of claims on account of the use of patents with certain other parties besides F. B. Fargo & Co., whose business the Creamery Package Manufacturing Co. had acquired. There was a provision for paying royalties to the Disbrow Co., with other details not necessary to mention.

On January 1, 1903, another agreement was entered into between the parties which disposed of and adjusted rights and contentions as to patents for a machine called a pasteurizer and cream ripener. By an agreement made January 1, 1903, the prices provided for in the sales contract were changed in certain particulars

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Package Manufacturing Company and not denied that it obtained a decree adjudging plaintiffs here infringers

of the patents which were the subject of the suit.

It is alleged that the defendants here conspired with one another to commence and prosecute the suits and that they were commenced and prosecuted maliciously and without probable cause, whereby plaintiffs were caused

certain items of damages.

The other allegations of the complaint need not be repeated in detail. They are to the effect that the contract of February 24, 1898, was made in violation of law to restrain state and interstate trade and commerce and that all that was done under it was in pursuance and execution of that purpose, including the suits brought against plaintiffs by the Owatonna Company and the Creamery Package Manufacturing Company for the infringement of patents. That prior to the bringing of those suits plaintiffs had a good and established trade and market for their churns and were manufacturing and shipping them in the States of Wisconsin, Iowa and South Dakota, and knowing this and fearing that such trade would be continued in those States and be extended to other States, defendants commenced the suits for infringement, and prior thereto and since have written letters and talked to purchasers and prospective purchasers of plaintiffs' churns, threatening lawsuits and actions for damages for infringement of the patents described in the bills and also threatened suits for injunction, and by this means destroyed plaintiffs' state and interstate trade.

That plaintiff D. E. Virtue and one Martin Deeg were the first joint inventors of a churn and butter worker and that a patent was issued therefor, No. 634,074, under which they manufactured those articles and sold them in state and interstate commerce except as they had been prevented by the suits brought against them as hereinbefore stated. And by elaborate allegations the patents upon

which those suits were brought are attacked for want of invention and novelty.

That the Creamery Package Manufacturing Company has purchased the property and business of other competitive concerns and that it has had during the last several years contracts with many and numerous dealers in the articles sold by which it required them to purchase such goods exclusively of it at certain fixed and maintained prices and to sell only in certain designated territory, the object of which is to secure a monopoly to the Creamery Package Manufacturing Company and to restrain interstate commerce. That all of the acts detailed were done in pursuance of a common scheme and conspiracy on the part of all of the defendants during the years 1897 and 1898 and ever since maintained and carried out, limiting the production of creamery supplies, fixing and determining their prices, restraining trade in them and monopolizing over 90% of their production and sale, of which prior to one year before the bringing of this action plaintiff had no knowledge or notice except the two suits in equity and the contract by which Virtue and Deeg transferred to the Creamery Package Manufacturing Company the exclusive right to manufacture the churn and butter worker under patent No. 634,074 for the period of three years. That they did not know that that contract was procured as part of the schemes of defendants. That they were at no time parties to acts of defendants and did not know of the wrongful contracts and combinations until after the time limited to take the testimony in the two equity suits.

The defendants answered the complaint, admitting some of its allegations and denying others. They alleged performance of the contract between the Creamery Package Manufacturing Company and the plaintiff Virtue and said Deeg and opposed to the charges of the complaint certain affirmative matters, including two actions brought in the state court.

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A jury was empaneled to try the issues which, under the instructions of the court, found a verdict for defendants upon which a judgment was duly entered. It was affirmed by the Circuit Court of Appeals, 179 Fed. Rep. 115.

The Circuit Court and the Circuit Court of Appeals both decided, that the damages which plaintiffs alleged they sustained were not a consequence of a violation by defendants of the provisions of the Sherman Anti-trust Act. Both courts assumed for the purpose of their decision that the contract of February 24, 1898, between the Creamery Package Manufacturing Company and the other manufacturers and sellers of churns and butter workers was a combination in restraint of trade, but both courts held that the Owatonna Company was not a party to it nor became associated subsequently in its scheme.

Of the infringement suits the Court of Appeals said they exhibited "a case where two suits are brought, one by a party to a lawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them respectively and where both parties were doing no more than exercising their legal rights." And the court declared in effect that it could see no sinister significance in the suits being simultaneous, and said, further, that after a thorough examination of the record it agreed with the Circuit Court that there was no evidence offered at the trial "which would warrant the jury in finding that any agreement of that kind existed."

The plaintiffs attack this conclusion in twenty-one propositions, some of which are of very broad generality and all, counsel contend, are supported by the decisions of this and other courts. It is quite impossible to consider them in detail without a review and repetition of the cases. The view we take of the case makes this unnecessary. The case is, as we have said, in narrow compass. The complaint charges a violation of the Sherman Act, and, as a means of accomplishing its purpose, the destruction of

plaintiffs' interstate trade by a malicious litigation of their rights. A necessary element of the charge is the cooperation of at least the corporate defendants in the purpose, and this determines our inquiry. In answering it we shall assume, as the lower courts assumed, that by the contract of February, 1898, the Creamery Package Manufacturing Company and the corporations competing with it entered into a combination offensive to the law. Did the Owatonna Company participate in it or subsequently join it or cooperate to execute its purposes? The question must be answered in the negative, as we shall proceed to show.

The Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it. which articles it sold throughout the United States, and by the contract of April 19, 1897, it constituted the Creamery Package Manufacturing Company its sales agent of them, the latter company not making churns and butter workers. The contract was a perfectly legal one and preceded by some time the agreement of the twentyfourth of February, 1898, entered into between the latter company and other corporations. There were contracts between the Creamery Package Manufacturing Company and the Owatonna Company subsequent to the latter date, but all of them were supplemental to the first one and had no illegal taint, nor did they affect it with illegal taint. It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights. but this was no violation of law. The owner of a patent has exclusive rights, rights of making, using and selling. He may keep them or transfer them to another-keep some of them and transfer others. This is elementary: and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in Standard Sanitary Manufacturing Company v. United States, 226 U.S. 20. But

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patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the nineteenth of April, 1897, constituted, as we said, the Creamery Package Manufacturing Company a sales agent of the churns and butter workers made by the Owatonna Company and fixed their list price. The patents under which the articles were manufactured were stated, and it was provided that the Owatonna Company should protect the Creamery Package Manufacturing Company from all suits for infringement, defend the validity of the patents and promptly attack infringers. This provision is expecially urged by plaintiffs as showing a common and illegal purpose between the companies. It has not that quality. It is but an assurance of title to the rights con-

veved.

But it is said that the contract between the companies dated June 4, 1898, exhibits knowledge by the Owatonna Company of the Creamery Package Manufacturing Company's purpose, and "fitted into the scheme of the two defendant corporations to get a monopoly in the United States;" and this, it is said further, "can only be when all of the doings . . . are looked at as a whole from beginning to end." We cannot concur. We have seen that the contract of June 4, 1898 (inserted above in the margin), was but a settlement of claims growing out of reciprocal charges of infringement and it has no other connection with the agreement of February, 1898, than that some of the claims were against corporations which were parties to that agreement. It would be far-fetched to say that the Owatonna Company could not assert rights or protect rights because they were asserted or sought to be protected against corporations which had become members of an illegal combination, without participating in the guilt of such combination and becoming a joint conspirator in its purposes. But it may be said that we are considering the transactions isolatedly and ignoring their combined effect. That indeed would be a fault, but in order to compute their combined effect we must estimate what strength they have separately, and so far, on the face of the contracts, there is nothing to inculpate the

Owatonna Company.

But a united purpose is sought to be established between it and the Creamery Package Manufacturing Company by the testimony of witnesses to the effect that the contract of April 19, 1897, between the Disbrow Manufacturing Company and the Owatonna Company was urged by the president of the Creamery Package Manufacturing Company, who represented that the acceptance of royalties by the Disbrow Company was better than a continuance of competition. It is not practicable to give all the testimony of what preceded and induced that contract The part most relevant to our inquiry is that which related to the competition which existed between the companies. A witness, who was president of the Owatonna Company at the time, testified that it was suggested to him and other officers of the company by Mr. Gates, president of the Creamery Package Manufacturing Company, that a settlement ought to be brought about by letter or otherwise with the Disbrow Manufacturing Company "so as to get the two churns which were then being manufactured together," and stated that he (Gates) had had some conferences with the Disbrow Company, and he thought that if the officers of the Owatonna Company would go to Mankato "there might be an arrangement made whereby that business could be brought in connection with ours. and in that way eliminate the competition that at that time existed between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company." This object was expressed by the witnesses in different ways.

The president of the Disbrow Manufacturing Company testified that Gates urged that the Disbrow Company should "stop manufacturing and make a contract with

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the Owatonna Manufacturing Company, and let them have all our patents on combined churns and butter workers and other things, and combine the whole business under one head, and let them do all of the manufacturing." The witness testified that he at first rejected the proposition and resented the manner in which the proposal was made, Cates going so far as to declare, with a profane accompaniment, "You will do it or we will put you out of business." But subsequently negotiations were resumed and the president of the Creamery Package Manufacturing Company explained that he wanted matters settled, litigation stopped, "and a new arrangement made so that the whole thing should be run under one head and one control," and in that way "control the whole churn business." The witness formulated the terms, which resulted, after some days of negotiation, in the contract of April 19. 1897. But during the negotiations the witness did not see the Owatonna Company's representatives until they reached the point of signing the contract.

These declarations seem to be very arbitrary and unjustifiable when standing alone and to have had no other purpose than the ruthless crushing of a competitor in the same line of business. They take on another character, or rather the object of the negotiations and the contracts which resulted from them, take on another character, when all the testimony is considered. It will be observed from the date of those negotiations and of the contracts that they preceded by nearly a year the contract between the Creamery Package Manufacturing Company and its competitors and could have had no relation to it. And, besides, they had a natural and adequate inducement. They were an adjustment of disputes and litigation growing out of a contract between the Disbrow Company and the Owatonna Company concerning the very same patents. In one suit the Owatonna Company was plaintiff against the Disbrow Company; in another suit the latter

company was plaintiff against the Owatonna Company and both suits were based on disputes as to rights or oblin tions arising from the contract of October 2, 1893. The testimony also shows some controversy between the Creamery Package Manufacturing Company and the Di brow Company in regard to other patents, but the effect of it is not easy to estimate. There was also a contract entered into between the Disbrow Company and th Creamery Package Manufacturing Company on the nineteenth of April, 1897, settling matters growing out a a contract between those companies made on the twelfth of October, 1896, by which the Disbrow Company made the Creamery Package Manufacturing Company its exclusive sales agent for churns and butter workers and mortgaged to the latter company its plant. The other provisions of the contract concern the adjustment of the relations between all of the companies under the contenporaneous contracts, and need not be stated in detail. It is clear, then, as we have already said, that what transpired on the nineteenth of April, 1897-negotiations and contracts-had no relation to the contract of February. 1898, and had for their inducement and object the settlement of controversies and rights growing out of the contract of October 2, 1893, between the Disbrow Company and the Owatonna Company, and that of October 12. 1896, between the Disbrow Company and the Creamery Package Manufacturing Company and the proposition of the latter company to become the sales agent of the churis made by the Owatonna Company. All of this is very complicated in the statement, but is simple enough in the results, and can be definitely estimated as to actual and legal effect. We may therefore sum up by saying that the Disbrow Company, by its contract with the Owatonna Company, did nothing more than confirm or enlarge the rights which the Owatonna Company had obtained, by the contract of 1893, and conveyed to it the exclusive right

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the patents for certain named royalties. This was no idation of law. The Owatonna Company did nothing nore in its contract with the Creamery Package Manuecturing Company than to make that Company its exlusive sales agent, and this was no violation of law. Both entracts had natural and adequate legal inducements and unveyed rights that could under the law be conveyed, and, as a necessary incident to the conveyance, one only of the parties could thereafter exercise them. It may be that the Disbrow Company was to an extent in competition with the Owatonna Company, but it was a competition in part, at least, which, it was contended, was illegally conducted against rights which had been transferred in 1893. But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture or of sale is not one condemned by hweet doubt diese to interior of indiacolina

It is, however, urged that the infringement suits brought by the Creamery Package Manufacturing Company and the Owatonna Company against plaintiffs were provided for by the contracts between the Owatonna Company and the Disbrow Company, and their coincidence in time is urged as proof of concerted action on the part of defendants and of a conspiracy to destroy plaintiffs' business. The contention is that the bringing of those suits was not single and isolated act but was a part of the more comprehensive plan and scheme to secure a monopoly in the United States of the business of making and selling creamery supplies, or, more accurately, counsel say, to continue and maintain the monopoly already acquired. And it is contended that the attempt was successful in that it destroyed plaintiffs' business. That these contentions are untenable we have demonstrated. The contracts we have shown were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights. Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-trust Act for the violation of the provisions of that act, seeking treble damages. This, indeed, plaintiffs take special pairs to allege, that there may be no confusion about the right or grounds or extent of recovery. The testimony shows that no wrong whatever was committed by the Owatonna Company, and the fact that it failed in its suit against plaintiffs does not convict it of any.

This is enough to dispose of the case, for the foundation of the complaint is that the defendants entered into a contract or combination in restraint of trade which caused damage to plaintiffs; and the guilt of the individual defendants and of the two corporations and of all of their officers, servants, and stockholders, is very carefully alleged. It was in this aspect that the case was tried.

But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground of the coöperation of the defendants in a scheme of monopoly and restraint of trade. There was no liability asserted in the Circuit Court or in the Circuit Court of Appeals against one of the defendants separately from the others. Concert and coöperation was asserted against all and a ruling was not invoked as to the separate liability of either. One Frank LaBare was a party defendant and as to him plaintiffs made a motion that "the case be dismissed and dropped." The court denied the

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motion for some reason and then plaintiffs' counsel said,
"We desire to proceed with the case as against the defendants, the Owatonna Manufacturing Company and the
Creamery Package Manufacturing Company." The
plaintiffs then offered to prove that they had not infringed
the patents sued on by the defendants. It is manifest,
therefore, that the separate liability of the Creamery
Package Manufacturing Company is an afterthought and
urged in this court for the first time.

There are twenty-seven errors assigned upon offers of testimony excluded or upon other rulings of the Circuit Court. These we have examined and find that in the view taken by the courts below of the case and that which we

take, there was no error of substance committed.

Judgment affirmed.